(1)

Supreme Court, U.S.
FILED

00 406 AUG 24 2000

OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

BOARD OF EDUCATION OF CENTRAL COMMUNITY UNIT SCHOOL DISTRICT 301, KANE COUNTY, ILLINOIS,

Petitioner,

v.

CHRISTOPHER SCIONTI,

Respondent.

On Petition For A Writ Of Certiorari To The Illinois Appellate Court

PETITION FOR A WRIT OF CERTIORARI

RAYMOND A. HAUSER
Counsel of Record
TODD K. HAYDEN
JOEL R. DETELLA
SCARIANO, ELLCH, HIMES, SRAGA AND PETRARCA, CHTD.
1450 Aberdeen
Chicago Heights, Illinois 60411
708/755-1900

Attorneys for Petitioner
Board of Education of Central Community
Unit School District 301, Kane County, Illinois

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

69pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether a student subject to expulsion from school has a due process right to learn the identity of student witnesses, to confront and cross-examine student accusers, or to have parents present or Miranda-type warnings given during the school's investigation of the underlying misconduct.

2. Whether a student subject to expulsion from school has a due process right to specificity in school rules similar to that applied to criminal statutes.

3. Whether liability under 42 U.S.C. § 1983 may be imposed against a local governmental entity such as a school district based upon a finding that the decision to expel a student was arbitrary and capricious.

4. Whether a student expelled from school who subsequently has the expulsion overturned in court is entitled to more than nominal damages for alleged procedural due process violations occurring during the expulsion.

TABLE OF CONTENTS

Page

Questions Presented for Review i

Table of Contents..... ii

Table of Authorities iii

Citations to Reports and Opinions 1

Statement of Jurisdiction..... 1

Constitutional Provisions, Treaties, Statutes, Ordinance and Regulations Involved 2

Statement of the Case 6

Argument 11

Conclusion 24

Appendix.....A-1

TABLE OF AUTHORITIES

Page

CASES

Anable v. Ford 653 F.Supp. 22 (W.D. Ark. 1985) 23

Betts v. Board of Education of City of Chicago, 466 F.2d 629 (7th Cir. 1972) 15, 17

Board of County Commissioners v. Brown, 520 U.S. 397, 117 S.Ct. 1382 (1997) 19

Braxton v. U.S., 500 U.S. 344, 111 S.Ct. 1854 (1991) 11

Carey v. Piphus, 435 U.S. 247, 98 S.Ct. 1042 (1978) 22

Darby v. Schoo, 544 F.Supp. 428 (W.D. Mich. 1982) 22

Fisher v. Burburnetti Independent School District, 419 F.Supp. 1200 (N.D. Tex. 1976) 17

Goss v. Lopez, 419 U.S. 565, 95 S.Ct. 729 (1974) 15

Harrison v. Sobol, 705 F.Supp. 870 (S.D. NY 1988) 23

Jett v. Dallas Independent School District, 491 U.S. 701, 109 S.Ct. 2702 (1989) 20

Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 507 U.S. 163, 113 S.Ct. 1160 (1993) 19

Linwood v. Board of Education of City of Peoria, School District No. 150, 463 F.2d 763 (7th Cir. 1972) 12, 16

Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602 (1966) 15

Monell v. Department of Social Services of City of New York, 436 U.S. 658, 98 S.Ct. 2018 (1978) 19, 20, 21

Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473 (1961) 18

TABLE OF AUTHORITIES – Continued

Page

Newsome v. Batavia Local School District, 842 F.2d 920 (6th Cir. 1988) 13

Paredes by Koppenhoefer v. Curtis, 864 F.2d 426 (6th Cir. 1988) 14

Whitfield v. Simpson, 312 F.Supp. 889 (E.D. Ill. 1970) 17

Wiemerslage v. Main Township High School District 207, 29 F.3d 1149 (7th Cir. 1994) 16, 17

Wood v. Strickland, 420 U.S. 308, 95 S.Ct. 992 (1975) 17, 18

CONSTITUTIONS, STATUTES AND RULES

The Fourteenth Amendment to the United States Constitution, § 1 (Equal Protection Clause) 2

28 U.S.C. § 1257 1

42 U.S.C. § 1983 ..... *passim*

Rule 10 of the Supreme Court of the United States 11

Rule 13.1 of the United States Supreme Court Rules 1

Illinois Criminal Code (720 ILCS 550/3; 720 ILCS 570/402 *et seq.*) 16

Illinois School Student Records Act (105 ILCS 10/1 *et seq.*) 6

CITATIONS TO REPORTS AND OPINIONS

1. Illinois Supreme Court denial of petition for leave to appeal, May 31, 2000 ..... A-1

2. Illinois Appellate Court opinion affirming Circuit Court, January 11, 2000 ..... A-2

3. Illinois Circuit Court findings and order on § 1983 claim, November 5, 1998 ..... A-21

4. Illinois Circuit Court findings and order on expulsion, September 9, 1996 ..... A-29

STATEMENT OF JURISDICTION

The judgment of the Illinois Appellate Court was entered on January 11, 2000. This judgment affirmed the decision of the Illinois Circuit Court entered on November 5, 1998. A petition for leave to appeal to the Illinois Supreme Court was denied by the Illinois Supreme Court on May 31, 2000.

This Court has jurisdiction to review the judgment of the Illinois Appellate Court on a *writ of certiorari* pursuant to 28 U.S.C. § 1257 and Rule 13.1 of the United States Supreme Court Rules.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED

1. **The Fourteenth Amendment to the United States Constitution, Section 1 (Equal Protection Clause).**

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

2. **§ 1983. Civil Action for Deprivation of Rights.**

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

3. Drug Policy, Central High School Student/Parent Handbook, 1995-1996.

All students at Central High School are prohibited from possessing, using, distributing, or selling intoxicating beverages, and/or their containers, marijuana, narcotics and other drugs (including look-alike drugs) and drug paraphernalia. The school's administration will deal sternly and directly with incidents involving drugs, narcotics, and alcohol. Compliance with these standards of conduct is mandatory.

Purchasing, possessing or using alcohol, behavior affecting drugs, look-alike drugs, or the misuse of prescription medication:

1. Where there is sufficient evidence to indicate that a student is *under the influence* of alcohol, behavior affecting drugs, look-alike drugs, or prescription medications not prescribed for the student in question on school grounds or at a school sponsored activity, the student shall immediately be suspended for ten (10) days and *may* be recommended to the Board of Education for expulsion or other alternative action.

   Students suspected of being "under the influence" while on school grounds, may be required to submit to a breathalyzer test or other established drug test. Refusal to comply will result in a ten (10) day suspension from school. The student *may* be recommended to the Board of Education for expulsion or other alternative disciplinary action.

2. If sufficient evidence exists that a student *has used, has purchased, or is in possession of* alcohol, behavior affecting drugs, look-alike

drugs, or has purposely misused prescription or over-the-counter medication on school property or at a school sponsored event, the student shall immediately be suspended for ten (10) days and *shall* be recommended to the Board of Education for expulsion or other alternative disciplinary action. The student may also be requested to seek counseling with an appropriate person or rehabilitation agency before returning to school. The Kane County Sheriff's Office will be notified.

3. Voluntary Admission and Request for Help:

Any Central High School student who feels he/she may have a drug or alcohol problem is encouraged to seek appropriate and professional help. All school personnel are sensitive to the underlying social and emotional reasons that can contribute to chemical use and dependency by students of any age. Any student, parent, friend, etc. wishing to seek help and assistance on behalf of themselves or another individual is encouraged to request help through school personnel without fear of disciplinary reprisal. All voluntary admissions and/or referrals will be confidential. Every effort will be made to address the situation with a positive intervention philosophy that will insure that the student's health and well-being is the most important priority. Any Central High School personnel contacted by a student, parent, friend, etc., will initiate the following procedure on behalf of the student.

a. Report to Principal and/or Student Assistance Team.

b. Principal and/or Student Assistance Team collects factual information.

c. Parent/Student conference with Principal and/or Student Assistance Team members or other appropriate Pupil Personnel staff. The conference will include:

(1) Review of case.

(2) Discussion of possible solutions.

(3) Development of a written intervention program and a signed agreement approved by the Principal.

(a) A commitment to enroll into a rehabilitation program authorized and approved by the Principal.

(b) A procedure to monitor the student's progress, to verify completion of rehab program, and a plan to support the recovery process.

(c) An understanding that if a student fails to abide by the signed agreement, disciplinary action will be enforced as per the stated policy in the Student/Parent Handbook.

Note regarding disciplinary review and adjudication. Under certain conditions a voluntary admission will not be given the same consideration as a Voluntary Admission and Request for Help. If a student is under suspicion or investigation for any drug or alcohol related incident, disciplinary action will

be pursued and imposed as per stated policy in the Student/Parent Handbook. (Emphasis in original.)

STATEMENT OF THE CASE

Plaintiff, Christopher Scionti, was a student in Central Community Unit School District No. 301. Prior to the start of the first period on November 7, 1995, Plaintiff was handed an opaque envelope by another student ("Student No. 2").[1] Plaintiff was told to "check it out" and was further told that the envelope might contain a packet and a note. Plaintiff thought the envelope contained some type of drug. Plaintiff put the envelope in his pocket and went to his first period class. Plaintiff withdrew the envelope from his pocket in his second period class and opened it. The envelope contained a white substance in a plastic bag and a letter which had gang symbols on it. Plaintiff examined and tasted the white substance.

Plaintiff showed the plastic bag and the white substance to a third student ("Student No. 3"). A different student ("Student No. 1") witnessed Plaintiff showing the plastic bag to Student No. 3. Plaintiff told Student No. 3 to look at the substance and asked him what it was. Plaintiff further asked Student No. 3 if he thought it was "coke." A fourth student ("Student No. 4") overheard

[1] The identities of the students other than Plaintiff are not revealed pursuant to the *Illinois School Student Records Act*. 105 ILCS 10/1 *et seq*.

Plaintiff tell Student No. 3 that he did not think the white substance was "coke."

Plaintiff admitted to Student No. 2 that he did not know what the substance was but that he had tasted the substance and it did not taste like anything. Student No. 1 overheard Plaintiff tell Student No. 2 that the Plaintiff did not think the white substance was real because it did not taste like anything. After Plaintiff determined that the white substance was not "real," he tossed it toward the back of the classroom. One of the students retrieved the plastic bag and gave it to Student No. 1. Student No. 1 gave the plastic bag containing the white substance to a school official.

The School Principal, Associate Principal and Assistant Principal questioned Student No. 1, Student No. 2 and Student No. 3, and took their written statements. The school administration promised Students 1 and 3 anonymity to calm their fears of student reprisal and ostracization by their peers. The school administrators also determined that the unnamed students' statements were reliable and that there was no reason to question their motivation in making the statements or to doubt their accuracy due to their reputation of veracity. The white substance was tested by the Kane County Sheriff's Department. The substance tested negative for a controlled substance.

The School District's handbook set forth a rule, which was in place prior to November 7, 1995, prohibiting the possession of look-a-like drugs. Section P.2 of the Student/Parent Handbook, received by all students and parents, states the following:

> All students at Central High School are prohibited from possessing . . . narcotics and other drugs (including look-a-like drugs)
>
> * * *
>
> If sufficient evidence exists that a student . . . is in possession of . . . look-a-like drugs . . . on school property . . . the student shall immediately be suspended for ten days and shall be recommended to the Board of Education for expulsion or other disciplinary action.

Pursuant to this rule, Plaintiff's parents were notified that their son had been suspended and recommended for expulsion for the November 7, 1995 incident and that a suspension/expulsion hearing was going to be held. Plaintiff's parents were further notified that at the hearing, school officials would present testimony regarding the incident and that Plaintiff and his parents had the right to appear at the hearing and present any testimony they wished to present. Plaintiff and his parents were notified that they could request other witnesses to appear and that they could be represented by an attorney.

On November 2, 1995, a hearing on the recommendation to expel Plaintiff was held before a hearing officer. Plaintiff and his parents attended the hearing and were represented by an attorney. Prior to the hearing, Plaintiff and his parents received a copy of the Assistant Principal's report which summarized the statements of the four unnamed students. The School Principal, Associate Principal and Assistant Principal attended the hearing on behalf of the District. Plaintiff testified at the hearing, and also called Student No. 2 as a witness. Plaintiff admitted

the conduct summarized above; Student No. 2's testimony corroborated Plaintiff's actions. Student Nos. 1, 3 and 4 did not testify at the hearing; however, their statements were made a part of the record. At the conclusion of the hearing, the hearing officer prepared a report for the Board of Education setting forth both the District's and the students' evidence.

The hearing officer's report was given to the Board of Education. The Board of Education reviewed the hearing officer's report, discussed the evidence and, after careful consideration, decided to expel Plaintiff for the remainder of the academic year. Plaintiff initially filed suit seeking administrative review of the decision to expel. Plaintiff then amended his suit to seek common law *certiorari*. The Illinois Circuit Court overturned the expulsion and Plaintiff returned to school[2] in the fall of 1996. After the Court ruled on the expulsion, Plaintiff added his § 1983 claim against the School District by submitting an amended complaint with this additional count. Plaintiff claimed a violation of his federal due process rights in connection with his expulsion from school and requested damages therefor under § 1983.

In ruling in Plaintiff's favor on his § 1983 claim, the Circuit Court stated that, "The rule relied upon by defendants in expelling the plaintiff [citation omitted] is unconstitutionally vague on its face and in its application." (Appendix, A-21.) The Circuit Court further stated that, "There is no suggestion he [plaintiff] was ever

---

[2] Plaintiff was expelled a second time in the fall of 1996, which expulsion was upheld upon court review. (Appendix, A-36-40.)

advised he was not required to answer questions or what penalty he faced if the interrogators decided he had broken the rule. He was not invited to have his parents or any other adult present to advise him." (Appendix, A-23.) The Circuit Court concluded that Plaintiff "has been denied the most minimal rights under the first, fifth and fourteenth amendments to the Constitution of the United States . . . " and that, "Having found the underlying constitutional violation of the plaintiff's rights under 42 U.S.C. 1983 the court is asked to determine and impose damages." (Appendix, A-24, 25.) The Circuit Court awarded damages in favor of Plaintiff in the amount of $153,660.

On January 11, 2000, the Illinois Appellate Court affirmed the judgment of the Circuit Court. In its opinion, the Appellate Court stated that, "We find, therefore, that the trial court correctly determined that defendant's policy was impermissibly vague with regard to the term 'look-alike drug . . . ' " and that "the trial court correctly determined that defendant's policy was impermissibly vague with regard to the term 'possession.' " (Appendix, A-12, 13.)

The Appellate Court also found that even if the School's policy was sufficiently precise, "it was unconstitutionally applied to plaintiff in this case" in that "defendant unconstitutionally deprived plaintiff of his property interest in his education in this case [citation omitted] through its arbitrary application of its drug policy and excessive punishment." (Appendix, A-13, 14.) On the issue of due process, the Appellate Court held that "defendant failed to afford plaintiff even the minimum process he was due when it refused to both identify the

witnesses against him and allow him the opportunity to test their credibility through cross-examination." (Appendix, A-17.)

On May 31, 2000, the Illinois Supreme Court denied the School District's request for discretionary review. (Appendix, A-1.)

ARGUMENT

I. The Illinois Appellate and Circuit Courts' Decisions Regarding Due Process Are In Conflict With United States Courts of Appeals Decisions.

The character of the reasons this Court considers for granting a *writ of certiorari* includes a ruling by a state court of last resort that is in conflict with a decision of a United States Court of Appeals on the same matter or a decision of this Court on the same matter. *Rule 10 of the Supreme Court of the United States*. The principal purpose for which this Court uses *certiorari* jurisdiction is to resolve conflicts among Circuit Courts of Appeals and state courts concerning the meaning of provisions of federal law. *Braxton v. U.S.*, 500 U.S. 344, 111 S.Ct. 1854 (1991). The decisions of the Illinois Courts in this case conflict with United States Courts of Appeals decisions in the Sixth Circuit and Seventh Circuit regarding a student's due process rights in school disciplinary cases.

A. Ruling Regarding Right To Confront And Cross-Examine Student Witnesses.

The Illinois Appellate Court held that the School District failed to afford the student even the minimum process he was due when it refused to identify the student witnesses against him and allow student witnesses to be cross-examined by the student's counsel. (Appendix, A-17.) The Illinois Appellate Court recognized the existence of United States Courts of Appeals decisions to the contrary, but expressly declined to follow them. (Appendix, A-17.) The Illinois Appellate Court decision on this issue is contrary to United States Courts of Appeals decisions in the Sixth Circuit and Seventh Circuit.

The United States Court of Appeals for the Seventh Circuit explicitly has held that the due process rights of an accused student, in a school discipline hearing, are not violated by not furnishing the accused student with a "list of the names and addresses of the witnesses who are to testify, and information with respect to the testimony each will give." *Linwood v. Board of Education of City of Peoria, School District No. 150*, 463 F.2d 763, 770 (7th Cir. 1972). Indeed, the court also has held that an accused student is not entitled to compel attendance of the student witnesses against him. *Linwood*, 463 F.2d at 770. Accordingly, the holding of the Illinois Appellate Court on this issue is in direct conflict with the decision of the United States Court of Appeals for the Seventh Circuit. For the foregoing reason, this Court should grant the School District's petition.

The United States Court of Appeals for the Sixth Circuit has also held that accused students in a school discipline hearing do not have the right to know the identity of student witnesses or to cross-examine them. In so holding, the Sixth Circuit noted that the value of cross-examining student witnesses in school disciplinary cases is muted by the fact that the veracity of a student account of misconduct by another student is assessed by the school administrator. *Newsome v. Batavia Local School District*, 842 F.2d 920, 924 (6th Cir. 1988). The school administrator is in the best position to judge the trustworthiness of a student because he has a "particularized knowledge of the student's trustworthiness." *Newsome*, 842 F.2d at 924. The court went on to state that:

> In this turbulent, sometimes violent, school atmosphere, it is critically important that we protect the anonymity of students who "blow the whistle" on their classmates who engage in drug trafficking and other serious offenses. Without the cloak of anonymity, students who witness criminal activity on school property will be much less likely to notify school authorities, and those who do will be faced with ostracism at best and perhaps physical reprisals. Giving due weight to the important interest a student accused of serious misconduct has in his public education, we conclude that the necessity of protecting student witnesses from ostracism and reprisal outweighs the value to the truth-determining process of allowing the accused student to cross-examine his accusers.

Newsome, 842 F.2d at 925. Like the Seventh Circuit, the United States Court of Appeals for the Sixth Circuit again held that in a school discipline setting, there is no right to

know the identity of student witnesses, no right to confront them, and no right to cross-examine them. In addition, it is the school administrator who is in the best position to judge the credibility of the student witnesses. "Due process does not require that the accused have a right to cross-examine his student accusers or know their identities." *Paredes by Koppenhoefer v. Curtis*, 864 F.2d 426, 429 (6th Cir. 1988) (citing *Newsome*, 842 F.2d at 924-25).

In the instant case, the Illinois Appellate Court held that the "administration's vouching for the reliability and credibility of the witness" is "especially offensive to traditional notions of due process" and therefore violative of due process in a school disciplinary hearing. (p. 16) Accordingly, the Illinois Appellate Court's decision on these issues is in conflict with the decision of the United States Appellate Court for the Sixth Circuit and, as such, this Court should grant the School District's request for review.

Given the law as it exists, it is completely unfathomable that the School District has been held to pay significant damages for a heretofore unprecedented procedural due process violation in a student disciplinary setting. The District simply followed the law as stated by the United States Courts of Appeals. The District also followed the law as stated by the very same Illinois Appellate Court in an earlier unpublished decision. (Appendix, A-36-40.)[3] Now, due to a decision in complete conflict

---

[3] This earlier decision was unpublished. The School District is not referencing it for precedential value, but instead to show that the School acted reasonably without any intent to violate the student's constitutional rights.

with federal precedent, the District is required to pay significant damages. For this reason, this Court should grant the District's petition.

B. Requiring School Disciplinary Matters To Satisfy Criminal Standards.

The Circuit Court and Appellate Court of Illinois held the School's student discipline rules in this matter to a criminal standard. (Appendix, A-22, 23 and A-11-13.) Specifically, the Circuit Court and Illinois Appellate Court applied criminal procedural rights of interrogation to the School administrators' investigation of the student's possession of a look-a-like substance. Not only does this place undue burdens on school officials which would render effective student discipline virtually impossible, such a decision is also in conflict with United States Courts of Appeals decisions.

While students have procedural due process rights regarding school discipline, *Goss v. Lopez*, 419 U.S. 565, 574, 95 S.Ct. 729, 736 (1974), these are not the rights contemplated by the landmark case of *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966). There is a sharp distinction between interrogation of criminal suspects and school students. Miranda warnings are not a requisite of due process in school expulsion hearings but a condition of admissibility in criminal prosecutions aimed at the evils of police coercion. *Betts v. Board of Education of City of Chicago*, 466 F.2d 629, n. 1 (7th Cir. 1972). Accordingly, the Illinois Circuit and Appellate Courts' decisions directly conflict with the United States Court of Appeals for the Seventh Circuit.

The Circuit Court and Illinois Appellate Court further ruled that the absence in the school rules of more particular definitions for terms such as "look-a-like drug" and "possession" provides the basis for overturning the expulsion and finding a violation of the Constitution. (Appendix, A-22-23 and A-11-13.) Such a ruling is in direct conflict with United States Courts of Appeals decisions.[4]

The Circuit Court and Illinois Appellate Court ignored precedential cases such as *Wiemerslage v. Main Township High School District 207*, 29 F.3d 1149 (7th Cir. 1994) and *Linwood v. Board of Education of City of Peoria*, 463 F.2d 763, 767 (7th Cir. 1972), which state that, given the peculiar issues facing school administrators, school discipline rules need not be drafted as narrowly or with the same precision as criminal statutes. The law requires that the description of the prohibited conduct must be with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. *Wiemerslage*, 29 F.3d at 1151-1152. Under such a standard for school districts, United States Courts of Appeals have rejected vagueness challenges to a school's enforcement of school rules against things such

---

[4] While the School Handbook does not define "look-alike" or "possession," neither does the *Illinois Criminal Code* (720 ILCS 550/3; 720 ILCS 570/402 *et seq.*) which provides for incarceration for possession of a look-alike drug. The fact that the Circuit Court's ruling conflicts with Illinois statutes as well as United States Court of Appeals decisions further bolsters the District's argument that this matter should be reviewed by this Court.

as "loitering," "gross disobedience or misconduct," "disobedience" and "dangerous drugs." *Wiemerslage v. Main Township High School District 207*, 29 F.3d 1149 (7th Cir. 1994); *Betts v. Board of Education of City of Chicago*, 466 F.3d 629 (7th Cir. 1972); See also, *Whitfield v. Simpson*, 312 F.Supp. 889 (E.D. Ill. 1970); *Fisher v. Burburnetti Independent School District*, 419 F.Supp. 1200 (N.D. Tex. 1976). The Circuit Court and Illinois Appellate Court findings conflict with these clearly established United States Courts of Appeals decisions.

C. Rewriting School Rules And Setting Aside Decisions Of School Administrators.

The Circuit Court and Illinois Appellate Court set aside the decision of the school administrators and Board of Education, and in doing so, placed themselves in the role of "super-school board." Indeed, a *de novo* review of the transcript was made and the trial court and Illinois Appellate Court substituted their findings in place of that of the administration and Board of Education. (Appendix, A-32-33, A-17-19.) Such action by the trial court and Illinois Appellate Court decision directly conflicts with that of the United States Supreme Court.

The United States Supreme Court has determined that it is not the role of courts to set aside decisions of school administrators which the court may view as lacking a basis in wisdom or compassion. *Wood v. Strickland*, 420 U.S. 308, 95 S.Ct. 992, 1003 (1975). Furthermore, § 1983 does not extend the right to re-litigate evidentiary questions arising in school disciplinary proceedings or the proper construction of school regulations. *Strickland*,

992 S.Ct. at 1003. Section 1983 was not intended to be a vehicle for court correction of errors in the exercise of discretion which do not rise to the level of violations of specific constitutional guarantees. *Strickland*, 992 S.Ct. at 1003. The system of public education that has evolved in this nation relies necessarily upon the discretion and judgment of school administrators and school board members.

The Circuit Court and Illinois Appellate Court set aside the decision of the Board of Education in this matter because they did not like the way that the school rules were written or applied. The United States Supreme Court has determined, however, that this is not permissible. This Court has recognized that action taken by a school district in good faith fulfillment of their responsibilities and within the bounds of reason under all the circumstances will not be punished and that they need not exercise their discretion with undue timidity. *Strickland*, 95 S.Ct. at 1000. Accordingly, the Circuit Court and Illinois Appellate Court decisions are in direct contradiction with the decisions of this Court. This Court should grant the District's petition.

II. The Liability Imposed Under Section 1983 Against The School District In This Case Conflicts With The Decisions Of The United States Supreme Court And United States Courts of Appeals.

Until 1978, municipal corporations such as school districts were generally not considered to be "persons" under § 1983 and were, therefore, immune from liability. See, *Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473 (1961). In

Monell v. Department of Social Services of City of New York, 436 U.S. 658, 98 S.Ct. 2018 (1978), this Court overruled *Monroe* and held that units of local government, including school districts, are "persons" under § 1983 and that municipal liability could be imposed for injuries inflicted due to governing policy or custom. Essentially, *Monell* abrogated the absolute immunity previously enjoyed by school districts under § 1983. Nonetheless, *Monell* did not create absolute liability against such units of local government for alleged violations of § 1983.

In *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 113 S.Ct. 1160 (1993), this Court reaffirmed *Monell* and held that a successful § 1983 claim requires the plaintiff to plead and prove that the alleged constitutional violation occurred as a result of a custom or policy of the governmental entity. More recently, while still following *Monell*, this Court has also stated that proof that a municipality's legislative body or authorized decision maker has intentionally deprived a plaintiff of a federally protected right necessarily establishes that the municipality acted culpably. *Board of County Commissioners v. Brown*, 520 U.S. 397, 117 S.Ct. 1382 (1997). In *Brown*, this Court also stated that a finding that an action taken or directed by the municipality or its authorized decision maker itself violates federal law also proves that the municipality is responsible for plaintiff's injury under § 1983. Thus, the limited circumstances under which a local governmental unit may be liable under § 1983 as set forth in *Monell* continue today and such entities cannot be held vicariously liable under a theory of *respondeat superior* for violations committed by

their officials or employees. *Monell*, 98 S.Ct. 2018. Importantly, it is not sufficient to impose liability that a valid policy or custom in fact caused a deprivation of federal rights. *Jett v. Dallas Independent School District*, 491 U.S. 701, 109 S.Ct. 2702, 2722 (1989).

In the instant case, a review of the Illinois Circuit and Appellate Court opinions reveals that an analysis of any custom, policy or practice of the School District is conspicuously absent. Instead, the Courts rely on an earlier conclusion of the trial court that the underlying expulsion of the Plaintiff was arbitrary and capricious and, therefore, the School District's actions in expelling the Plaintiff denied him rights protected under the Constitution and enforced under § 1983. In light of existing decisions of various United States Courts of Appeals as set forth in Section I herein, the School District was merely enforcing what it reasonably believed was a valid school rule (and perhaps more importantly a socially responsible rule) prohibiting students from possessing look-a-like drugs. The student thought differently and had his expulsion overturned. It strains logic and demeans the judicial system when a court subsequently concludes that the School District's rule against possessing look-a-like drugs is unconstitutionally vague. What reasonable person does not understand the meaning of "look-a-like" drug? Apparently, the Illinois Circuit and Appellate Courts do not understand and, by holding this rule to be unconstitutionally vague, found that no reasonable person could decipher the meaning of this rule.

Obviously, this was not the intent behind § 1983 and clearly not the intent of this Court when it decided *Monell*. Unfortunately, that is precisely what happened in this

case. We now have a situation in which a high school student was expelled for possession of a substance that looked like cocaine, and who has been awarded a judgment in excess of $150,000 against the School District for enforcing its policy against possession of look-a-like drugs by students. More amazingly, this has occurred in an environment where society in general and parents in particular are more demanding than ever upon schools and school administrators to provide a safe, secure and drug-free environment in which their children may be educated. Surely, had the School not acted, and if the student in question subsequently brought some harm to himself or to others, the District would be defending another lawsuit claiming it was deliberately indifferent to a known problem. Section 1983 should not be viewed as the vehicle to challenge every decision of a governmental entity, but that is the unfortunate result of this case.

In direct contradiction of *Monell* and its progeny, the Illinois courts in this case have turned the Constitution and § 1983 upside down. The Illinois courts imposed § 1983 liability against the School District without reference to any standard previously articulated by this Court with respect to such claims. Instead, the Illinois courts relied on the state law standard employed by the trial court to overturn the expulsion (i.e., whether the expulsion was arbitrary and capricious) without any further analysis or consideration of the standards governing § 1983 liability against governmental entities. The Illinois courts' decisions have equated the state law review standard for student disciplinary action with that necessary to impose § 1983 liability. This drastically departs from this Court's decisions in *Monell* and its progeny, and

improperly turns § 1983 into a mechanism to convert state law administrative review proceedings into constitutional torts. Moreover, one practical effect of this case is to open the door for Plaintiff's attorneys to add a § 1983 claim to every state law challenge to local government action and recover their attorneys' fees from the governmental entities for enforcing state laws rather than federal statutes or federal constitutional provisions.

III. Awarding Plaintiff Over $150,000 In Damages For A Procedural Due Process Violation Conflicts With Decisions Of This Court And Other Federal Courts.

In this case, even assuming the imposition of liability was proper, the Court's calculation and assessment of damages so tremendously deviated from decisions of this Court and other federal courts that it warrants consideration by this Court. A total of $153,660 was awarded to Plaintiff, $150,000 of which is broken down as follows: $25,000 – cost of future psychotherapy; $25,000 – loss of social opportunity; $100,000 – emotional distress. (Appendix, A-28.)

In *Carey v. Piphus*, 435 U.S. 247, 98 S.Ct. 1042 (1978), this Court noted that while mental and emotional distress caused by a denial of procedural due process is compensable under § 1983, where the school disciplinary action was otherwise justified, the plaintiff would be entitled only to nominal damages not to exceed one dollar. Similarly, in *Darby v. Schoo*, 544 F.Supp. 428 (W.D. Mich. 1982), the court found that the school officials violated the student's rights by changing a suspension to an

expulsion without requesting a board hearing on the issue of the expulsion. The court found that although an award of compensatory damages was appropriate for the violation of the student's due process rights, compensatory damages were limited to an award of one dollar. In *Anable v. Ford* 653 F.Supp. 22 (W.D. Ark. 1985), the court found that a violation of procedural due process rights by failure of a school to inform a student of all evidence against her prior to utilization of drug test results, and prior to a request for voluntary withdrawal, entitled the plaintiff only to nominal damages of one dollar. In *Harrison v. Sobol*, 705 F.Supp. 870 (S.D. NY 1988), the court found that although the defendants' conduct was in clear violation of the students' rights, the plaintiffs were entitled only to nominal damages of one dollar.

The appropriate remedy in this case was sought and obtained by Plaintiff (reversal of the expulsion he believed to have been wrongfully imposed). This fact combined with the status of case law delineating the requirements for due process in student disciplinary cases as it existed at the time the School District acted in this matter, the fact that Plaintiff was expelled a second time (which expulsion was upheld upon a court challenge), and that much of the alleged "suffering" endured by Plaintiff occurred after the second expulsion, the award of damages in this case is so extravagant and against the precedent established by this Court that judicial intervention is necessary.

CONCLUSION

Based upon the direct conflict between the state court decision in this case and decisions of the United States Courts of Appeals, and given the importance of the federal questions presented (students' due process rights in school disciplinary matters), this Court should exercise its discretion to hear this case. This Court should grant the District's petition so that it may clearly establish that the schools of our nation should be a peaceful, safe learning environment and not a litigation breeding ground for extraordinary damage awards for expelled students.

Respectfully submitted,

RAYMOND A. HAUSER
Counsel of Record
TODD K. HAYDEN
JOEL R. DETELLA
SCARIANO, ELLCH, HIMES, SRAGA AND PETRARCA
1450 Aberdeen
Chicago Heights, Illinois 60411
708/755-1900

Attorneys for Petitioner Board of Education of Central Community Unit School District No. 301, Kane County, Illinois

SUPREME COURT OF ILLINOIS
CLERK OF THE COURT
SUPREME COURT BUILDING
SPRINGFIELD, ILLINOIS 62701
(217) 782-2035

May 31, 2000

Mr. Joel R. DeTella
Scariano, Ellch, Himes, Sraga and Petrarca
1450 Aberdeen
Chicago Heights, IL 60411

No. 89219 – Christopher Scionti, respondent, v. Central Community Unit School District No. 301, petitioner. Leave to appeal, Appellate Court, Second District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on June 22, 2000.

[This Order Is Not Procedential And Is Not To Be Cited]

No. 2--98--1517

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

CHRISTOPHER SCIONTI, Plaintiff-Appellee, v. CENTRAL COMMUNITY UNIT SCHOOL DISTRICT NO. 301, Defendant-Appellant (Richard Perry, Hearing Officer for Central Community Unit School District No. 301, Albert Barwa, David Oleson, and Monte Phillips, Defendants).	Appeal from the Circuit Court of Kane County. No. 95--MR--427 Honorable Melvin E. Dunn, Judge, Presiding.

RULE 23 ORDER

(Filed Jan. 11, 2000)

Defendant, Central Community Unit School District No. 301, that plaintiff, Christopher Scionti's expulsion be expunged from school records and awarding plaintiff $153,660 in damages. We affirm.

On November 7, 1995, a student handed an opaque envelope containing a small plastic bag to plaintiff a few minutes before the beginning of first period. The student told plaintiff to check it out. Plaintiff placed the envelope in his pocket and attended class. During second period, plaintiff pulled the envelope from his pocket, opened it, and examined the bag at eye level Plaintiff saw that the bag contained. a white powder and then tossed it toward the rear of the room. The envelope was recovered by another student who brought it to the principal. The principal turned the envelope over to the Kane County Sheriff's Department for testing and the testing determined that the contents were not a controlled substance.

At that time, the school's rules against drug use and possession provided:

> "All students at Central High School are prohibited from possessing, using, distributing, or selling intoxicating beverages, and/or their containers, marijuana, narcotics and other drugs (including look-alike drugs) and drug paraphernalia.
>
> * * *
>
> If sufficient evidence exists that a student *has used has purchased, or is in possession of* alcohol, behavior affecting drugs, [for] look-alike drugs, *** the student shall immediately be suspended for ten (10) days and shall be recommended to the Board of Education for expulsion or other alternative disciplinary action." (Emphasis in original.)

Plaintiff's parents were informed that defendant would conduct an evidentiary hearing concerning the

incident. Plaintiff and his parents were also informed that they would be allowed to appear at the hearing and present evidence and that they could be represented by an attorney.

On November 22, 1995, defendant conducted the hearing. Plaintiff and his parents attended and were represented by an attorney and defendant was represented by the school principal, associate principal, and assistant principal. The assistant principal's report, which contained summaries of statements made by unnamed students, was incorporated into the hearing record. Following the hearing, the hearing officer made a report, which summarized facts and arguments presented by the parties.

The hearing officer's report and the administration's recommendation of expulsion were considered by defendant's board of education. The board expelled plaintiff for the rest of the 1995-1996 school year. Plaintiff then filed suit in the circuit court seeking administrative review of the board's expulsion decision.

The trial court determined that plaintiff's possession was not knowing and intentional and that the expulsion was an unreasonable punishment based on the circumstances of the case. The trial court ordered plaintiff's expulsion to be reversed and expunged from his record. Following the trial court's decision, plaintiff amended his pleadings by adding a Claim for damages pursuant to section 1983 (42 U.S.C. § 1983 (West ___)).

Beginning September 15, 1998, a hearing on plaintiff's section 1983 claim was held at which the following evidence was adduced. William Hoecker, defendant's

superintendent during the 1995-1996 school year, testified concerning defendant's student disciplinary policy. Hoecker testified that defendant's student-parent handbook gave a complete statement of defendant's policy relating to drugs or look-alike drugs.

Hoecker testified that the term "look-alike drug" was not defined by either the student-parent handbook or the school board policy manual. Additionally, Hoecker testified that neither the handbook nor the manual described any standards to determine whether a student was in possession of a drug or look-alike drug Hoecker testified that he had not promulgated any written standards concerning the definitions of the terms "look-alike drug" or "possession" to any of defendant's administrators nor could he identify any parent or student orientation meeting at which these terms had been discussed.

Hoecker testified that defendant's policy was to expel any student found to possess drugs or look-alike drugs, notwithstanding that the student-parent handbook allowed "other alternative disciplinary action" to be taken in such cases. Hoecker testified that the student-parent handbook for the 1996-1997 school year was amended by removing the passage providing for alternative disciplinary action.

Hoecker testified that he had a "very common sense understanding" of the term "look-alike drug;" that it was a self-defining term. Hoecker testified that a "look-alike drug refers to a substance that looks like a drug. or may be purported to be a drug." Hoecker also testified that, for a student to be in possession of a look-alike drug, the substance must not be a drug. In addition, Hoecker

defined possession by reference to the student's conduct. For example, if a student had the substance but was intending to turn it over to the building principal, then, for purposes of defendant's" disciplinary policy according to Hoecker, that student would not have possessed the drug or look-alike drug. However, according to Hoecker, if a student first examined the substance and then threw it away, that student would be in possession under the disciplinary policy. Hoecker admitted that his understanding of the policy was not set forth in writing and that he had never communicated his understanding to any students or parents.

Plaintiff's father, Al Scionti, testified that he had a good relationship with plaintiff before his enrollment at Central High School. Scionti and plaintiff would frequently go fishing and camping. Scionti testified that plaintiff had never had academic or disciplinary problems in school prior to high school. He testified that, shortly after the beginning of the school year, plaintiff complained that several kids were pushing him into lockers and windows and picking on his girlfriend.

After plaintiff was suspended for allegedly possessing a look-alike drug, Scianti testified that he called the school to discuss the matter and spoke to David Oleson, one of the high school administrators, Scionti testified that Oleson informed him that there would be an expulsion hearing before a hearing officer and advised Scionti to get a lawyer. Scionti also testified that Oleson stated that if plaintiff were to withdraw from school, the expulsion hearing would be canceled.

Scionti testified that he told Oleson that he found the situation to be bizarre because he understood that plaintiff was handed an envelope which he then threw away and that the substance was not a controlled substance. Scionti testified that Oleson replied, "That's what happened, but we 100 percent get rid of every kid we want. We've never lost an expulsion hearing, and my advice to you is to withdraw him because you probably won't be able to put him in a another school after I expel him."

Scionti testified that he retained a lawyer to represent plaintiff at the expulsion hearing. The attorney attended the hearing before the hearing officer, but Scionti testified that he was unable to appear before the school board because the attorney slid into a ditch on the night of the school board hearing. Scionti testified that he asked the board for a continuance in order to allow plaintiff to be represented by his attorney but the board refused. The board affirmed Hoecker's recommendation and expelled plaintiff effective November 27, 1995.

Scionci testified that, in the months following his expulsion, plaintiff became very withdrawn and uncommunicative. Plaintiff obtained an interview at Fox Valley Lutheran and was excited about the prospect. However, when plaintiff learned that he would not be allowed to start until the end of January 1996, he became more withdrawn than before. Scionti testified that plaintiff completely neglected his hygiene, failing to wash or shower and wearing the same clothes day after day. Plaintiff also brought food into his room where it would rot, refused to clean his room, and became very angry if asked to clean, his room. Scionti testified that he became the focus for plaintiff's anger. and that their relationship

changed, with plaintiff becoming uncommunicative. Plaintiff began to grow increasingly aggressive and confrontational.

Plaintiff attended Fox Valley Lutheran for about three weeks and then ran away. After two or three weeks, plaintiff's parents located him in, Springfield, picked him up, and admitted him to the Mercy Mental Health Center. Plaintiff remained at Mercy for about three weeks, during which time he became a little more docile and communicative. When the Scionti's insurance ran out, plaintiff was removed from the Mercy Mental Health Center.

The Scionti's obtained counseling for plaintiff. Scionti testified that plaintiff would refuse to follow their rules, staying out for two or three nights in a row, totaled a family automobile, and withdrew money from the parent's bank account without consent. As a result, plaintiff was charged in certain juvenile proceedings.

Scionti testified that plaintiff reentered Burlington Central High School in the fall of 1996. In September 1996, the trial court ruled in favor of plaintiff's motion for summary judgment and ordered defendant to reverse and expunge the expulsion from plaintiff's record. Scionti testified that plaintiff was never contacted about making up the class work he missed the previous year. He also testified that defendant did not attempt to assess the impact the expulsion had on plaintiff. Scionti testified that plaintiff was again expelled in 1996 for conduct unrelated to the earlier expulsion.

Plaintiff testified that he felt alone after he was expelled in 1995. He testified that he sat alone in his room and did not talk much with anyone or eat meals with his

family. Plaintiff testified that he wanted to do normal things, but was not allowed to. Plaintiff testified that when he returned to school in 1996, no teacher or administrator talked with him about the events of the previous year. He also testified that no one gave him the opportunity to make up class work from the previous year.

Plaintiff testified that he was currently employed as a bellman at a local resort. He testified that he was pursuing his GED at Waubonsie Community College and that defendant had done nothing to help him complete the GED requirements.

Upon the conclusion of the section 1983 hearing, the trial court ruled in favor of plaintiff. The trial court awarded plaintiff $153,660 in damages. Defendant timely appeals.

Defendant initially argues that, because it did not violate any of plaintiff's constitutional rights, it was not liable for damages pursuant to plaintiff's section 1983 claim. To prove a claim under section 1983, a plaintiff must demonstrate that a person has deprived him of a constitutionally protected right while that person was acting under color of state law. *Wehde v. Regional Transportation Authority*, 284 Ill. App. 3d 297, 306 (1996). A governmental entity can be sued directly under section 1983 where the allegedly unconstitutional action implements or executes its official policies, rules, or regulations. *Allen v. Board of Trustees of Community College District No. 508*, 285 Ill. App. 3d 1031, 1037 (1996).

Defendant first contends that the trial court erred in finding that plaintiff's constitutional rights were violated when the principal and other administrators questioned

him about the incident in the absence of plaintiff's parents and without providing him with *Miranda*-type warnings before the questioning. While this contention is legally correct (see *In re E.M.*, 262 Ill. App. 3d 302, 307-09 (1994) (school administrator not required to give *Miranda* warning to student when making an investigation independent of police)), it is of no moment in this case as the trial court did not premise its finding that defendant had violated plaintiff's constitutional, rights during defendant's interrogation of plaintiff. We note, parenthetically, that defendant had a policy, set forth in Central High School's student-parent handbook, of contacting parents and attempting to secure their presence when disciplining and, interrogating students. The evidence in this case shows that plaintiff's parents were not contacted until after plaintiff had been questioned and suspended. Moreover, defendant did not ask them to attend any of the questioning. While this conduct did not, in and of itself, deprive plaintiff of his constitutional nights, the trial court noted, and we agree, that defendant's disregard of its own stated policy was indicative of the arbitrary and capricious manner in which it handled this case.

Defendant next contends that the trial court erred by determining than Central High School's policy on possession of look-alike drugs was unconstitutionally vague both on its face and as applied to plaintiff. In order to show that a rule or regulation is facially vague, the claimant must show that the rule or regulation is impermissibly vague in all of its applications. *Granite City Division of National Steel v. Illinois Pollution Control Board*, 155 Ill. 2d 149, 163 (1993). Thus, in order to pass constitutional

muster, a rule must apprise the community of what conduct is allowed and what conduct is prohibited and it must not leave those charged with implementing the rule too much discretion. so as to result in oppressive or discriminatory application. *Granite City,* 155 Ill. 2d at 163. In other words, the rule must provide, with sufficient certainty, fair warning and notice of what conduct is prohibited as measured by Common understanding. *Granite City,* 155 Ill. 2d at 164. The rules at issue in this case are not, however, criminal statutes; rather they are school disciplinary rules and as such, they are not required to have the same precision as a criminal statute. *Wiemerslage v. Maine Township High School District 207,* 29 F.3d 1149, 1152 (7th Cir. 1994).

Defendant maintains that the look-alike drug policy in the student-parent handbook was not facially vague and provided sufficient warning to students concerning what conduct was prohibited. We disagree. The handbook fails to define either of the terms "look-alike drugs" or "possession." Defendant claims that the term "look-alike drug" is really the school's manner of saying a substance that looks like a prohibited drug or illegal controlled substance. Unfortunately for defendant, not even the Central High School administrators were able to agree upon a single definition of the term. Hoecker testified that he believed that the term "look-alike drug refers to a substance that looks like a drug or may be purported to be a drug." Dr. Barwa, principal of the high school in 1995-96, testified that a look-alike drug was a "material or substance presented by a student as a drug or believed by the student to be a drug." Dr. Barwa further testified that if the student believed that the substance was not a drug,

then it would not be a look-alike drug. Monte Phillips, the assistant principal in charge of freshman discipline, testified that, in order to determine whether a substance was a look-alike drug under the school policy, one had to consider its appearance and its packaging. He noted, however, that these factors were not set forth anywhere in the handbook. Oleson, the associate principal during 1995-96, testified that the term "look-alike drug" defined itself. Thus, the administrators charged with executing the policy were unable to agree upon the meaning of "look-alike drug" in the context of the school policy. We find, therefore, that the trial court correctly determined that defendant's policy was impermissibly vague with regard to the term "look-alike drug."

Defendant asserts that the term "possession" is also sufficiently precise as to notify students what conduct is prohibited under the school policy. We again disagree. We note that the term is not defined in the handbook. Hoecker defined the term in conjunction with the student's purpose or state of mind: if the student were disposing of the substance, then his possession was appropriate and would not trigger disciplinary action, but any other purpose would be inappropriate and subject the student to disciplinary action. Dr. Barwa, testified that possession was merely "to have and to hold," with no reference to the student's knowledge or purpose. We note that, a student must have committed gross misconduct or disobedience in order to suffer the penalty of expulsion. See *Stratton v. Wenona Community Unit District No. 1*, 133 Ill. 2d 413, 434 (1990). This implies that, in order to constitute gross misconduct, the student's possession of a prohibited substance must be knowing, but the student's state

of mind was nowhere referenced in the handbook or was otherwise disseminated to students, parents, or teachers. Moreover, the two senior administrators, Hoecker and Dr. Barwa, disagreed on whether a student's possession must be knowing. Based on this record, we again find that the trial court correctly determined that defendant's policy was impermissibly vague with regard to the term "possession."

We also find that, even assuming that defendant's policy regarding the possession of controlled substances was sufficiently precise, it was unconstitutionally applied to plaintiff in this case. The record shows that plaintiff was given an opaque envelope and told to check out its contents. Plaintiff placed the envelope in his pocket and attended his first class of the school day. At the beginning of his second class, plaintiff opened the envelope, looked at the substance packaged in a plastic bag, and discarded it in the back of the classroom. Plaintiff's conduct indicates that, rather than knowingly possessing a drug or look-alike substance, he disposed of it as soon as he realized that the envelope might contain illegal drugs. Defendant suggests that plaintiff knew what the envelope contained and showed it to other students while speculating as to its contents. This, however, misstates and embellishes the factual findings of defendant's hearing officer. Defendant's response to plaintiff's actions was oppressive, arbitrary, capricious, and an abuse of discretion. *Robinson v, Oak Park & River Forest High School,* 213 Ill. App. 3d 77, 82 (1991) (review of student's expulsion requires the reviewing court to consider the egregiousness of the student's conduct, the student's disciplinary record, the impact or potential disruption of the student's

conduct on the delivery of educational services to the other students, the severity of the punishment, and the interest of the student). Defendant apparently had treatment-oriented alternatives which were used in instances where students came to school while intoxicated, and these, alternatives could have been made available to plaintiff in this case. Instead, defendant appears to have made an example of plaintiff for conduct which cannot be termed, under any stretch of the imagination, as "gross misconduct." Expulsion, therefore, was wholly unwarranted and accordingly, we determine that defendant unconstitutionally deprived plaintiff of his property interest in his education in this case (see *Stratton*, 133 Ill. 2d at 432) through its arbitrary application of its drug policy and excessive punishment.

Defendant suggests that plaintiff erroneously argues that expulsion for a drug-related offense would always be unconstitutional. Defendant's position, that expulsion is proper in some cases, is obviously correct, as well as being of no moment in this case. Plaintiff nowhere argues that expulsion is always an unconstitutional punishment; rather, plaintiff limits his argument to the facts of this case and the policies of defendant. We therefore find defendant's argument on this point to be irrelevant.

Defendant next contends that the trial court erroneously determined that plaintiff's expulsion was an excessive punishment and was against the manifest weight of the evidence. Defendant initially argues, in the abstract, that defendant could in fact mandate the penalty of expulsion if a student were found to have possessed a controlled substance or a look-alike substance. Defendant fails, however, to tie its abstract proposition to the facts of

this particular case. Thus, while defendant can order expulsion for gross misconduct, it must first prove that gross misconduct. The trial court found that expulsion was an excessive penalty for the conduct which had been proved in this case, not that defendant could never expel a student. Thus, defendant's argument misses the mark because it fails to address the factual circumstances of this case. Accordingly, defendant's argument is again irrelevant to the particular facts of this case.

Defendant also contends that the trial court erroneously determined that defendant's decision to expel plaintiff was against the manifest weight of the evidence. Defendant argues that the statements of the anonymous student-witnesses proved plaintiff's knowledge and belief that he possessed an illegal controlled substance. Defendant argues that plaintiff's inability to learn the identity of the witnesses and cross-examine them did not violate his rights to due process when balanced against the burden on the school officials. We disagree.

Due process requires, at a minimum, notice and a meaningful opportunity to be heard. *Colquitt v. Rich Township High School District No. 227*, 298 Ill. App. 3d 856, 863 (1998). To determine the nature of the proceedings and the procedural safeguards which must be present requires analysis of the following factors: "(1) the significance of the private interest which will be affected, (2) the risk of the erroneous deprivation of that interest through the procedures used, and (3) the significance of fiscal and administrative burdens that the additional or substitute procedural safeguards would entail." *Colquitt*, 298 Ill. App. 3d at 863.

In *Colquitt*, the plaintiff was denied the opportunity to cross-examine several of the witnesses against him, even though their statements were entered into. evidence at his hearing. *Colquitt*, 298 Ill. App. 3d at 864. The court ruled that the plaintiff was denied due process because the outcome of the hearing depended on the credibility of the witnesses. *Colquitt*, 298 Ill. App. 3d at 864. In addition, the court emphasized that, because rules of evidence were not used in an expulsion hearing, the school's action of vouching for the credibility and reliability of the non-testifying witnesses was particularly prejudicial *Colquitt*, 298 Ill. App. 3d at 865.

Initially, we note that plaintiff's interest in a public education is a significant property interest which may not be taken away without the minimum procedure required by the Due Process Clause. *Colquitt*, 298 Ill. App. 3d at 864. We must determine, therefore, whether the procedures used in this case were adequate to protect against the erroneous deprivation of plaintiff's interest.

Here, defendant investigated the offense, created the evidence to be presented, and vouched for that evidence when the assistant principal testified that the students providing the statements were reliable and credible. As in *Colquitt*, this was an egregious departure from the adversarial standard. *Colquitt*, 298 Ill. App. 3d at 865. By refusing plaintiff's request to learn the identity of the witnesses and to cross-examine them, plaintiff was denied any meaningful opportunity to be heard. In short, defendant provided plaintiff with a kangaroo court (as evidenced by Oleson's assertion to plaintiff's father that the school "100 percent get[s] rid of every kid" it wants to expel and that had never lost an expulsion hearing) and,

without the opportunity to test defendant's case through cross-examination, plaintiff had no hope of affecting the outcome. Accordingly, we hold that defendant failed to afford plaintiff even the minimum process he was due when it refused to both identify the witnesses against him and allow him the opportunity to test their credibility through cross-examination.

Defendant urges this court to follow a number of foreign cases in which it was determined that the denial of the opportunity to cross-examine witnesses in an expulsion hearing was not violative of the student's due process rights. We decline to do so, however, because in this ease, as in *Colquitt*, only the student witnesses actually observed the incident and their credibility was paramount. Moreover, we find the administration's vouching for the reliability and credibility of the witnesses to be especially offensive to traditional notions of due process. If the prosecutor is allowed to investigate and shape the evidence, prevent the evidence, vouch for the reliability and truthfulness of the evidence, and then refuse to give the accused any opportunity to challenge the evidence, the accused is not allowed a meaningful opportunity to be heard and the hearing does not comport with the requirements of due process.

Defendant also contends that the trial court ignored plaintiff's statement to Dr. Barwa that he thought the envelope might contain drugs. Defendant urges that this statement alone is sufficient to support plaintiff's expulsion and that, therefore, the trial court's determination was erroneous. We disagree. We note that this statement is not as damning as defendant would have this court believe. It is a paraphrase of what plaintiff told Dr. Barwa

during the second round of questioning by an unknown number of administrators. Moreover, plaintiff was alone in an undoubtedly highly stressful and coercive situation with no adults present on his behalf during any of the questioning. The length and tenor of this questioning is not a part of the record. In addition, defendant's paraphrase of plaintiff's statement and, presumably, plaintiff's statement, was equivocal. Plaintiff thought the envelope might (and impliedly, might not) contain drugs. Interestingly, this evidence is not mentioned in the hearing officer's report. While it was apparently produced at the hearing, the officer appears to have given little consideration to it. We do not find that plaintiff's equivocal statement justifies his expulsion and, consequently, we hold that the trial court did not err by determining that plaintiff's expulsion was against the manifest weight of the evidence.

Defendant last contends the trial court erred by imposing more than nominal damages. Defendant notes that the current and future out-of-pocket portion of the damage award amounts to $28,660. The remainder of the damage award, $125,000, is attributable to loss of social opportunities and emotional distress. Defendant argues that plaintiff's own acts were sufficient to break the chain of causation and preclude the award of damages. We disagree.

The issue of proximate cause is a question of fact for the finder of fact to decide. See *Carter v. Skokie Valley Detective Agency, Ltd.*, 256 Ill. App. 3d 77, 81 (1993). When reviewing a factual determination, this court accords the fact finder substantial deference and will not disturb the finding unless it is against the manifest weight of the

evidence. *People ex rel. Illinois Historical Preservation Agency v. Zych*, 186 Ill. 2d 267, 278 (1999). A determination is against the manfiest weight of the evidence where the opposite conclusion is clearly evidence or where it is unreasonable, arbitrary, and not based on any of the evidence. *Jordan v. National Steel Corp.*, 183 Ill. 2d 448, 456 (1998).

The trial court heard the testimony of two experts on the effect of the expulsion on plaintiff. Dr. Marvin Schwartz testified for defendant and opined that the expulsion was a positive experience. The trial court noted that it accorded Dr. Schwartz's testimony absolutely no credibility whatsoever. Dr. Robert Shapiro testified for plaintiff and detailed the effects on plaintiff. The trial court accorded Dr. Shapiro's testimony great weight. Dr. Shapiro opined that the expulsion caused all of the psychological damage in this case and actually caused the so-called "intervening acts" committed by plaintiff. After reviewing the testimony of both experts, we conclude that the trial court's determination on causation was not against the manifest weight of the evidence.

Defendant assigns error to the fact that the trial court stated in its order that it did not consider the events which occurred after the first expulsion. After reviewing the record, however, we note that Dr. Shapiro testified that all of the damage to plaintiff was caused by the first expulsion and that later events caused no further damage to plaintiff. Thus, the trial court's determination, if poorly expressed, was well founded from consideration of the evidence presented in this case.

Additionally, defendant's contention that plaintiff's actions following the first expulsion served as intervening acts to break the chain of causation fails to take into account Dr. Shapiro's testimony on causation. Defendant argues, in effect, that this court should ignore the testimony given in this case and the factual determination made by the trial court and substitute its judgment on this issue. This we may not do. See *Zych*, 186 Ill. 2d at 278. Thus, we find no error in the trial court's award of damages to plaintiff.

Accordingly, for the foregoing reasons, we affirm the judgment of the circuit court of Kane County.

Affirmed.

INGLIS, J., with THOMAS and HUTCHINSON, JJ., concurring.

COUNTY OF KANE)

IN THE CIRCUIT COURT
FOR THE SIXTEENTH JUDICIAL CIRCUIT

CHRISTOPHER SCIONTI Plaintiff	)	
vs.	)	NO. 95 MR 427
CENTRAL COMMUNITY SCHOOL DIST. 301; RICHARD PERRY, Hearing Officer for Central Community Unit School Dist. 301; ALBERT BARWA, DAVID OLESON, and MONTE PHILLIPS Defendants	)	

FINDINGS & ORDER
(Filed Nov. 5, 1998)

This matter came on for hearing spread over several days. There was substantial testimony. Multiple exhibits were received in evidence from both sides. There was oral argument at the conclusion of the evidence. The court has thoroughly reviewed and considered all of the evidence received together with the exhibits as well as the pleadings and argument of counsel. Based thereon the court finds as follows:

1. The rule relied upon by the defendants in expelling the plaintiff (px 11) paragraph P 1, at page 41) is unconstitutionally vague on its face and in its application. The phrase "look

alike drug" was defined by the defendants as "a look alike drug." It has never been established that the substance which the plaintiff allegedly possessed was any kind of a *drug*. It was determined that it was not a controlled substance. Possession is not defined nor is the penalty clearly defined *or imposed* in accordance with the rule. (Emphasis provided)

The rule specifically says "the student *may* (emphasis theirs) be recommended to the Board of Education for expulsion or *other alternative disciplinary action.*" (Emphasis supplied) The testimony of the Superintendent Mr. Hoecker was that he understood no other alternative was available to him except to recommend expulsion and that the School Board had never failed to follow his recommendation although on two occasions the time element was modified by the School Board.

The terms "look alike drug" and "look alike substance" are rather freely used to describe the rule and the event. The rule prohibits " . . . possession of a look alike *drug* . . . " (Emphasis added). Even the threshold question is left unanswered. If the material is not a look alike "drug" but merely a look alike "substance" there can be no violation based upon the plain language of the rule. (px11 id.)

The defendant argues that 105 ILCS 5/10-22.6 absolves it from any action taken against a student for " . . . gross disobedience or misconduct." Those terms are mentioned in the "Student-Parent Handbook" (px11) at page 31, paragraph numbered 5 and elsewhere. Nowhere is there a definition of "gross disobedience or misconduct." Nowhere in the manual/handbook is there a provision allowing school district representatives to interrogate students outside of the presence of a parent or legal guardian. They have the right to search but not to inquire. (Px 11, Para T, page 43). Even where police are involved in an interrogation the rules provide for notice to " . . . the parent or other adult having custody" (Px 11, page 44, paragraph U2.) The plaintiff was interviewed twice by school officials about the incident. There is no suggestion he was ever advised he was not required to answer questions or what penalty he faced if the interrogators decided he had broken the rule. He was not invited to have his parents or any other adult present to advise him (Oleson affidavit of 8-4-98) and Oleson testimony.

As stated earlier Superintendent Hoecker testified he was given no other option except to seek expulsion (Hoecker direct) and the School Board has never failed to follow his recommendation. This in the face of the plain language of the rule which allows for " . . . other alternative disciplinary action." (Px11, page 41, para P1). It is interesting that the handbook for the subsequent year was amended to remove the alternative discipline possibility.

"Zero tolerance" has become the watch word in our schools and generally in our society. It is an appropriate and aggressive posture and may lead to the control of some insidious evils perceived, not limited to drugs, but

including for instance gangs and anything identified with gangs. The result of this approach however has been to devolve upon school authorities in particular, enormous quasi police powers without attendant restriction or responsibilities. It has lead, in this case, to trampling the constitutional rights of the plaintiff Christopher Scionti. He has been denied the most minimal rights under the first, fifth and fourteenth amendments to the Constitution of the United States and under Article 1, sections 2 and 12, and Article 10, section 1 of the Constitution of the State of Illinois.

The right to a free education is an invaluable property right which has been taken away by the administration and by the school board in their arbitrary capricious unreasonable and oppressive imposition of an order of expulsion against the plaintiff. This is especially true given the history of the plaintiff and the circumstances. There was no evidence of egregious conduct. He disposed of a substance immediately upon opening the envelope he was given. While there was hearsay testimony of unidentified witnesses at the school hearing that he showed the substance to others or that he tasted it there was no evidence at trial to support those findings in the report of the hearing officer. There were no directions in the handbook (px11) as to how to dispose of a substance that came unbidden into a students' possession.

The position of the School Administrators and the School Board presents a person accused of a violation with a "stacked deck." Christopher Scionti did not know he could decline to answer questions or that his uncounseled attempt to cooperate, in two interviews, would absolutely lead to his expulsion. Rather than offering any ameliatory

opportunities the administration and the School Board apparently decided to teach the plaintiff, and perhaps others, a less by "throwing the plaintiff to the wolves," that is, into a society in which drug use is rampant without offering any help to gain control of the situation, of himself, or to resist peer pressure.

Having found the underlying constitutional violation of the plaintiff's rights under 42 U.S.C. 1983 the court is asked to determine and impose damages.

In addressing the issue of damages the court is disregarding the second expulsion and many of the arguments made about the personal frailties of the plaintiff's brother Tim or his sister's eating disorder or even his parents [sic] failure to proceed with an evaluation by school authorities be they local or state. This is particularly true since litigation was pending and the court suspects that plaintiff's counsel did not wish to add any arrows to the defendant's quiver.

There is no doubt that Chris Scionti suffers from learning problems, perhaps even ADD. His I Q is sufficient to allow him to complete his studies but he suffers slow thought processes in a variety of areas. Various theories have been offered for his present condition. There is no doubt that some of his problems existed well before expulsion. There is further no doubt that the expulsion exacerbated his condition and lead to some of his bizarre behavior. It must be recognized that one takes a party as they find them and not as they wish they had been. After the expulsion Christopher isolated himself; became lacking in personal hygiene; accumulated spoiled food in his room; took his father's car and damaged it to the extent

of a total loss; took funds from his mother's bank account through the unauthorized use of her ATM card and ran away from home with his equally young girl friend leaving no information as to his whereabouts. They were safely at the home of his grandmother but failed to inform his parents. Interestingly the grandmother failed to call as well which raises the unrelated issue of her mental competence.

Christopher was apprehended, jailed, hospitalized at Mercy Health Center as constituting a danger to himself and others and was subsequently examined, interviewed, counseled and variously mentally and psychologically "poked at". He received counseling and evaluations from Dr. Robert Shapiro, Tri City Family Services, the Kane County Diagnostic Center and Dr. Marvin Schwarz. Dr. Shapiro and Schwarz were presented to the court as "experts." Dr. Schwarz arrived at his determination that the expulsion, rather than being harmful, was helpful to Christopher in that it taught him a lesson. He described the expulsion as " . . . a very positive and needful experience (which) assisted him in dealing with reality and it assisted him to begin to understand the results of his actions – anti social behavior. He has become a better human being." This court in its notes on the testimony of Dr. Schwarz has two side comments. The first quoting from the famous television series "Mash" is "horse puckey" the second described Dr. Schwarz as "a hired gun with no bullets." His testimony was so outrageous that this court gives it no credibility whatsoever either as to content or as to his demeanor as he testified.

The court on the other hand lends great credence to the records referred to by Dr. Shapiro from Mercy Mental

Health Center as well as his own psychological testing, interviews and observations over an extended period of time and several sessions. At the time of his expulsion Christopher Scionti was an unsophisticated freshman at the end of his second month of attendance. At the time of his expulsion he had been tardy five times, had drawn gang graffiti on his note book and had encountered a "confrontation with two other students over the possible use of a racial slur by Chris" The reason or reasons may never be known but the fact is that the School Board and the Administration over reacted to the so called "possession" episode. The Board has broad discretion but it is not without boundaries. There cannot be unfettered a discretion when it relates to the important property rights that constitute school attendance. In further evidence of its irrational response to the situation the board made no distinction between student Hodge who *delivered* the substance and student Scionti who was briefly in possession. The punishment imposed clearly shocks the conscience of the court.

The plaintiffs actual out of pocket losses are as follows:

A.	Dr. Shapiro's bill	$1,260.00
B.	Ombudsman School	$2,400.00
C.	Dr. Shapiro estimates the cost of future physiotherapy at $50,000.00 to $60,000.00 and counsel for the plaintiff demands $400,000.00 for reimbursement for loss of social opportunities, emotional distress and related injured [sic].	

Based upon all of the foregoing it is hereby ordered as follows:

1. Judgment is entered in favor of the plaintiff and against the defendants as follows:

a.	Reimbursement for counseling (Shapiro)	$ 1,260.00
b.	Attendance Ombudsman School	$ 2,400.00
c.	Cost of future psychotherapy	$ 25,000.00
d.	Loss of social opportunities	$ 25,000.00
e.	Emotional distress	$100,000.00
	Total	$153,660.00

Issues relating to attorneys fees and costs are reserved.

Enter this 4th day of November, 1998.

/s/ Melvin Dunn
Judge

COUNTY OF KANE)

IN THE CIRCUIT COURT FOR THE SIXTEENTH JUDICIAL DISTRICT KANE COUNTY, ILLINOIS

CHRISTOPHER SCIONTI, Plaintiff	)	NO. MR KA 95-0427
vs.	)	
CENTRAL COMMUNITY UNIT SCHOOL DISTRICT NO. 301; RICHARD PERRY, Hearing Officer for the Central Community Unit School District No. 301; ALBERT BARWA; DAVID OLESON and MONTY PHILLIPS, Defendants	)	

FINDINGS AND ORDER

This matter comes on for hearing on the plaintiff's Motion for Summary Judgment, the defendant's Response thereto, and the defendants combined Motion to Dismiss, Deny, Certiorari and for Summary Judgment.

The court has reviewed the pleadings, the argument of counsel, and authorities presented. The court has also considered appropriate statutory provisions particularly as they relate to the Illinois School Code. Based thereon the court finds as follows:

1. Christopher Scionti in approximately the third month of his freshman year at Burlington Central High School was expelled for the balance of the school year.

2. The expulsion was based upon certain rules, policies, and procedures set forth in a student/parent handbook for the 1995/96 school year. Pertinent portions of that handbook were attached to the defendant's pleadings as Exhibit A. Since only a section is attached it is impossible to accurately cite the portion which the court will refer to here but it is contained at Exhibit A page 41 numbered paragraph 2 and reads as follows:

   "2. If sufficient evidence exists that a student *has used, has purchased, or is in possession of* alcohol, behavior affecting drugs, look a like [sic] drugs, or has purposely misused prescription or over the counter medication on school property or at a school sponsored event, the student shall immediately be suspended for ten (10) days and shall be recommended to the Board of Education for expulsion or other alternative disciplinary action. The student may also be requested to seek counseling with an appropriate person or rehabilitation agency before returning to school. The Kane County Sheriff's office will be notified." (Emphasis provided).

   The court notes the use of the word "shall" in the articulation of the penalties to be imposed and that expulsion is listed as the primary disciplinary action

with "other alternatives" available. Certainly the tone of anticipated discipline is set if not the fact.

3. Case law presented to this court is replete with the requirement that a court in reviewing a School Board of Education action to determine whether or not it abused discretion in student discipline " . . . must consider the egregiousness of the students' conduct, history or record of the students' past conduct, likelihood that conduct will affect delivery of educational service to other students, severity of punishment, and the interest of the student." *Robinson vs. Oak Park and River Forest High School Board of Education, et al.* 213 Ill. App. 3d 77, 156 Ill. Dec. 951, 571 N.E. 2d 931 (1st Dist. 1991)

A careful review of the suspension/expulsion appeal hearing report and attached documents demonstrates conflicting statements. In the opening paragraph of the "suspension/expulsion appeal hearing report" dated November 22, 1995 attached as Exhibit C to the defendant's Memorandum of Law the following summary is given as "background":

"On Monday, November 7, 1995, at or around the morning "5-minute warning bell" before classes began for the day, student 99048 gave an *opaque* envelope containing a small plastic bag to Christopher Scionti. Christopher was asked by student 99048 'to check it out' or words to that effect. (Emphasis provided)

During the second class hour of the day, Christopher withdrew the envelope from his

pocket. He withdrew the small plastic bag from the envelope. He examined the small plastic bag by holding it up to near eye level. He saw the bag contained a white powder. Christopher 'tossed' the small plastic bag toward the rear of the room.

The Kane County Sheriff's department determined that the unidentified white powder contained in the plastic bag was not a controlled substance."

If in fact the envelope was "opaque" then Scionti had no way of knowing what it contained until he opened it. Upon opening and identifying the content as a small bag containing a white powdery substance he immediately divested himself of that substance. Accordingly, there can be no "knowing possession of a look a like [sic] substance." As a matter of law Scionti's "possession" was not knowing nor was it proven to be intentional. His method of disposing of the item may have been inappropriate but arguably less dangerous than traversing the halls of the high school on the way to an administrator's office during which time possession would have been knowing and intentional even though he intended to turn it over to that administrator.

4. Scionti was never allowed to cross-examine the witnesses who allegedly saw him taste the material although the hearing officer appears to have relied to a great extent on that testimony. It was argued that no one every [sic] testified that they saw Scionti taste the material but just that he had

reported that he had done so to the cited students. Certainly the circumstances suggest just as reasonably that this was mere braggadocio on the part of Scionti as opposed to a statement of fact. It should also be noted that our television programs and motion pictures consistently demonstrate the "tasting" of white powdery substances by both good guys and bad guys including police officers. There is no showing that Scionti would have known what cocaine tasted like even after he tasted it.

5. Even if Scionti were shown to have knowingly possessed a look a like [sic] substance as an adult it would be treated simply as a petty offense. 720 ILCS 570/404. The punishment imposed upon Scionti goes far beyond that which would be imposed pursuant to a violation leading to a finding of guilty on a petty offense.

6. The November 22nd report was made after all concerned had had an opportunity to review and consider the November 13th report sent to "District 310 hearing officer" from Assistant Principal Monte Phillips. The first paragraph and the first half of the second paragraph are the words " . . . and went to Math class. . . . " support the statement made by Scionti. The remainder of that paragraph states that conversations took place which were either involving or overheard by four other students. One wonders what the teacher was doing while these activities were going on but nevertheless must consider what was allegedly said by the students.

7. The issues before the court relating to the findings of the school board and the subsequent expulsion of Scionti are not moot based upon the passage of time and the termination of the school year. Genuine issues relating to Scionti's future both in high school and college as well as any subsequent job opportunities may be directly affected.

Considering all of the foregoing in the light of the schools' own rules as set forth above the court finds that the ruling of the hearing officer that Scionti was in possession of look a like [sic] drugs is clearly against the manifest weight of the evidence.

In addition, even assuming that this were an accurate finding and that the hearing officer's report were [sic] valid the penalty far exceeds what was reasonable under the circumstances.

The findings of the hearing officer and subsequent action of the School Board were arbitrary, unreasonable, capricious and oppressive. Given alternative disciplinary actions available with a minimum suspension of 10 days the outright expulsion of the student was inappropriate. He had no prior substantial record of any violation of rules either in elementary school or in high school; there was no likelihood that his conduct would affect delivery of educational services to other students; the interest of other students were not threatened and the actions of Scionti, even if taken at full face value were not so egregious as to suggest the penalty imposed.

IT IS THEREFORE ORDERED as follows:

a. Plaintiff's motion for summary judgment and for Certiorari is granted. Defendant's motion for dismissal and for summary judgment is denied.

b. The order of Expulsion is to be expunged from Scionti's record as are any findings that he "knowing [sic] possessed a look a like [sic] substance."

Entered this 9 day of Sept., 1996.

/s/ Dunn
Judge

[This Order Is Not Precedential And Is Not To Be Cited]

No. 2–97–0860

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

CHRISTOPHER SCIONTI, Plaintiff-Appellant, v. COMMUNITY UNIT SCHOOL DISTRICT 301, BOARD OF EDUCATION for CENTRAL COMMUNITY UNIT SCHOOL DISTRICT 301, WILLIAM HOECKER, Superintendent, and DAVID OLESON, Principal, Defendants-Appellees.	) Appeal from the Circuit Court of Kane County. No. 96–MR–421 Honorable Barry E. Puklin, Judge, Presiding.

SUMMARY ORDER

(Filed May 7, 1998)

The plaintiff, Christopher Scionti, appeals from an order of the circuit court of Kane County which affirmed a decision made by the defendant, the Board of Education for Central Community Unit School District 301 (the Board), which expelled the plaintiff from high school for the remainder of the 1996-97 academic year. On appeal, the plaintiff raises several due process arguments relating

to the manner in which his expulsion hearing was conducted. In response, the Board initially argues that the appeal should be dismissed as moot because the plaintiff's expulsion ended in June 1997 and he chose not to attend the school for the 1997-98 academic year. We agree.

An issue is moot if no actual controversy exists or where events occur which make it impossible for the court to grant effectual relief. *Dixon v. Chicago and North Western Transportation Co.*, 151 Ill. 2d 108, 116 (1992). An appellate court will not review a case merely to resolve moot or academic questions, to establish precedent, or to render a judgment for future litigants. *City of Chicago v. Leviton*, 137 Ill. App. 3d 126, 129 (1985). However, "in certain, rare cases" an otherwise moot issue may occasionally be considered where the case presents an issue of substantial public interest or is capable of repetition, yet evading review. *Dixon*, 151 Ill. 2d at 117. The test for determining whether a sufficient degree of public interest exists requires that three elements be examined: (1) the public nature of the question presented; (2) the need for an authoritative determination for the future guidance of public officials; and (3) the likelihood of recurrence of the question. *City of Chicago v. Leviton*, 137 Ill. App. 3d 126, 129 (1985). Illinois courts apply the public interest exception narrowly and require each criterion to be met to avoid dismissal of moot questions on appeal. *Leviton*, 137 Ill. App. 3d at 129.

The plaintiff contends that this case falls within the public interest exception claiming that two issues of public importance are raised by the case: (1) whether schools may discipline students for possession of gang symbols;

and (2) whether the plaintiff was entitled to know the identity of and cross-examine his student accusers. We disagree with the plaintiff's assertion that those issues as presented by this case fall within the public interest exception.

With respect to the plaintiff's contention about the gang-symbol issue, we note that it was only one of several allegations, and perhaps the least severe in nature, upon which evidence was presented. At the plaintiff's disciplinary hearing, the Board also heard evidence that the defendant activated a false fire alarm, sexually harassed a female student on a school bus, and made derogatory racial and ethnic remarks. Thus, it is readily apparent from the record that the Board's decision that the plaintiff engaged in gross misconduct warranting expulsion would have been supportable based on misconduct other than his possession of gang symbols. In fact, from our review of the record and case law, the Board's decision is supportable on the lone basis that the plaintiff falsely activated the school fire alarm. The Board was not required to make written findings supporting its decision (see *Board of Education of Community Unit School District No. 300 v. County Board of School Trustees of Kane County*, 60 Ill. App. 3d 415, 319 (1978)), and we further note that we could affirm the Board's decision on any basis appearing in the record (*First Midwest Bank, N.A. v. Sparks*, 289 Ill. App. 3d 252, 258 (1997); *Hoffer v. School District U-46*, 273 Ill. App. 3d 49, 59 (1995)). Thus, it would not even be necessary for us to reach the issue to decide the case on the merits. Given the insignificance of the gang-symbol allegation in light of the other, more serious allegations of misconduct, we do not find that the

issue falls within the public interest exception. Moreover, we note that given the grave danger that gangs pose in public schools, we find it unlikely that the issue would be resolved in favor of the plaintiff. Since a school disciplinary code need not be drafted as narrowly or with the same precision as a criminal statute (see *Wiemerslage v. Maine Township High School District 207*, 29 F. 3d 1149, 1152 (8th Cir. 1994)), the plaintiff erroneously relies on our recent decision in *City of Harvard v. Gaut*, 277 Ill. App. 3d 1 (1996), which declared unconstitutional a municipal ordinance prohibiting the display of gang symbols.

Regarding the issue of whether the plaintiff was entitled to know the identity of and cross-examine his student accusers, we find that it does not present an issue of substantial public interest because sufficient precedent already exists to guide school officials in the future. Recently decided cases uniformly indicate that a student does not have a procedural due process right to know the identity of or cross-examine anonymous student informants. *Newsome v. Batavia Local School District*, 842 F. 2d 920, 924-26 (6th Cir. 1988); *Paredes v. Curtis*, 864 F. 2d 426, 428-29 (6th Cir. 1988); *Gorman v. University of Rhode Island*, 837 F. 2d 7, 16 (1st Cir. 1988); see also *Osteen v. Henley*, 13 F. 3d 221, 225 (7th Cir. 1993) (where court found that a student in a student disciplinary proceeding did not have a right to have counsel participate in the proceeding by cross-examining witnesses).

Nor do we find that this case falls within the exception for cases "capable of repetition, yet evading review." For this exception to apply, the complaining party must demonstrate that: the challenged action is in its duration too short to be fully litigated prior to its cessation and (2)

there is a reasonable expectation that the *same complaining party* would be subjected to the same action again. *In re A Minor,* 127 Ill. 2d 247, 258 (1989). Here, there is no expectation that the plaintiff would be subjected to the same action by the school again since he has chosen to seek a GED instead of enrollment at the school.

For all of the above-stated reasons, we find that this case is not among the "certain, rare cases" contemplated by our supreme court as coming within an exception to the mootness doctrine. See *Dixon,* 151 Ill. 2d 108, 117 (1992). Therefore, in accordance with Supreme Court Rule 23(c)(3) (166 Ill. 2d R. 23(c)(3) we dismiss the appeal as moot.

Appeal dismissed.

THOMAS, J., with DOYLE and COLWELL, J.J., concurring.

Supreme Court, U.S.
FILED
OCT 16 2000
OFFICE OF THE CLERK

(2)

No. 00-406

In The
SUPREME COURT OF THE UNITED STATES

BOARD OF EDUCATION OF CENTRAL COMMUNITY UNIT SCHOOL DISTRICT 301, KANE COUNTY, ILLINOIS,

Petitioner,

v.

CHRISTOPHER SCIONTI,

Respondent.

On Petition For A Writ of Certiorari
To The Illinois Appellate Court

BRIEF IN OPPOSITION

Stephen M. Cooper
Peter M. Storm *
Philip J. Piscopo
LAW OFFICES OF
COOPER & STORM
117 S. Second Street
P.O. Box 388
Geneva, IL 60134
630-232-6170
Counsel for Respondent

*Counsel of Record

QUESTIONS PRESENTED

1. Whether the Illinois Circuit Court and Appellate Court decisions Correctly Determined that the Defendant's actions violated both State law and Plaintiff's constitutional rights to substantive due process and procedural due process.

2. Whether the Illinois courts did not apply too rigorous a standard in deciding that the look-alike drug policy was impermissibly vague or unconstitutionally applied to the Plaintiff.

3. Whether the Defendant School District's execution and implementation of its unconstitutional look-alike drug policy clearly rendered it liable under 42 U.S.C. 1983 for Plaintiff's injuries and Defendant waived any *Monell* related defenses by failing to raise them below.

4. Whether the evidence presented clearly supported the trial court's award of damages.

TABLE OF CONTENTS

Questions Presented.....i

Table of Contents.....ii

Table of Authorities.....iii

Statement of the Case.....1

Argument.....6

I. The Illinois Circuit Court and Appellate Court Decisions Correctly Determined That The Defendant's Actions Violated Both State Law and Plaintiff's Constitutional Rights to Substantive Due Process and Procedural Due Process.....6

II. The Illinois Courts Did Not Apply Too Rigorous a Standard in Deciding That the Look-alike Drug Policy Was Impermissibly Vague or Unconstitutionally Applied to the Plaintiff.....11

III. The Defendant School District's Execution and Implementation of Its Unconstitutional Look-alike Drug Policy Clearly Rendered it Liable Under 42 U.S.C. 1983 for Plaintiff's Injuries and Defendant Waived any *Monell* Related Defenses By Failing to Raise Them Below.....14

IV. The Evidence Presented Clearly Supported the Trial Court's Award of Damages.....17

CONCLUSION.....19

TABLE OF AUTHORITIES

CASE **PAGE**

ALLEN V. BOARD OF TRUSTEES OF COMMUNITY COLLEGE DISTRICT NO. 508, 285 ILL.APP.3D 1031, 1037 (1996).....6

ARMSTRONG V. SQUADRITO, 152 F. 3D 564, 570 (7TH CIR. 1998).....6,14

BOARD OF COUNTY COMMISSIONERS V. BROWN, 520 U.S. 397, 405, 117 S. CT. 1382, 1389, 137 L.ED.2D 626 (1997).....6

CAREY V. PIPHUS, 435 U.S. 247, 908 S.CT. 1042 (1978).....17,18

COLQUITT V. RICH TOWNSHIP HIGH SCHOOL, 298 ILL. APP. 3D 856 (1ST DIST. 1998).....9

GRANITE CITY DIVISION OF NATIONAL STEEL CO. V. ILLINOIS POLLUTION CONTROL BOARD, 155 ILL. 2D 149, 163 (1993).....16

LINWOOD V. BOARD OF EDUCATION OF CITY OF PEORIA, 463 F.2D 763 (7TH CIR. 1972).....6,7,8

MATHEWS V. ELDRIDGE, 424 U.S. 319, 334 96 S.CT. 893, 902 (1976).....9,10

MONELL V. DEPARTMENT OF SOCIAL SERVICES OF THE CITY OF NEW YORK, 436 US 658, 56 L ED 2D 611, 98 S.CT. 2018.....14,16,17

NEWSOME V. BATAVIA LOCAL SCHOOL DISTRICT, 842 F.2D 920 (6TH CIR. 1998).....6,8,9

OKLAHOMA CITY V. TUTTLE, 471 U.S. 808, 816, 105 S.CT. 2427, 2432, 85 L.ED.2D 791 (1985).....16

STRATTON V. WENONA COMMUNITY UNIT DISTRICT NO. 1, 133 ILL. 2D 413, 434 (1990).....13

WIEMERSLAGE V. MAINE TOWNSHIP HIGH SCHOOL DISTRICT 207, 29 F.3D 1149, 1152 (7TH CIR. 1994).....12

YOUAKIM V. MILLER, 425 U.S. 231, 234, 96 S.CT. 1399, 1401, 47 L.ED.2D 701 (1976) (PER CURIAM).....16

STATEMENT OF THE CASE

In the fall of 1995, the Plaintiff, Christopher Scionti, was expelled for his entire freshman year from Burlington Central High School under a "look-alike" drug policy. The School District expelled the Plaintiff for allegedly having temporary possession of a bag containing a white powder that tested negative for any controlled substance. The Illinois Second District Appellate Court opinion describes what happened as follows:

> **The record shows that plaintiff was given an opaque envelope and told to check out its contents. Plaintiff placed the envelope in his pocket and attended his first class of the school day. At the beginning of his second class, plaintiff opened the envelope, looked at the substance packaged in a plastic bag, and discarded it in the back of the classroom. Plaintiff's conduct indicates that, rather than knowingly possessing a drug or a look-alike substance, he disposed of it as soon as he realized that the envelope might contain illegal drugs. (A-13)[1]**

The Defendant's Statement of the Case contains numerous false statements and omissions of the evidence actually presented to the trial court. In its

[1] This citation and others similarly styled are to the Appendix to Defendant's Petition.

appeals to the Second District Appellate Court in Illinois, and the Illinois Supreme Court, the Defendant provided citations only to its own pleadings for its statement of the facts, rather than a single citation to any evidence that was actually introduced during the trial. Throughout these proceedings, and now here in an effort to obtain review in this Court, the Defendant's version of the facts is not based upon the trial court record. Instead, Defendant's factual account of the alleged incident is taken exclusively from statements contained in a memorandum that was given to the hearing officer by the school administrators.

The Illinois Appellate Court specifically recognized that the Defendant's distortion of the facts could be traced back even before the trial, to its version of Defendant's hearing officer's report. The Appellate Court's opinion notes that the suggestion by the Defendant that the Plaintiff knew what the envelope contained and showed it to other students while speculating as to its contents "misstates and embellishes the factual findings of defendant's hearing officer." (A-13).

None of the "student witnesses" referred to in Defendant's Statement of The Case ever testified at *any* hearing, including the several days of trial on Plaintiff's Section 1983 claims. Those student statements appear only in the school administrators' memorandum referred to above. Even Plaintiff's alleged statements to other students referred to in the third paragraph of Defendant's Statement of The Case are taken from that memorandum. Those alleged statements were never presented through any testimony to the trial court. The trial court's written opinion carefully notes that

"[w]hile there was hearsay testimony of unidentified witnesses at the school hearing that he showed the substance to others or that he tasted it, there was no evidence at trial to support those findings in the report of the hearing officer." (A-24).

From the evidence actually presented at trial, the trial court and the appellate court found that the Defendant school district's policy of expulsion for possession of a look-alike drug was unconstitutionally vague as written for several reasons. First, the courts found the policy impermissibly vague because the terms "look-alike" and "possession" were not defined at all in the student/parent handbook. (A-12). Second, and most importantly, the courts determined the policy could not possibly provide students with sufficient warning as to what conduct it prohibited because the testimony of the three administrators charged with executing the policy established that even they were unable to agree upon the meaning of the term "look-alike drug" in the context of the policy, and that the two senior administrators of the school district disagreed upon whether a student's possession of a "look-alike drug" must be "knowing" in order to constitute "gross misconduct." (A-13).

Both the trial court and the appellate court went further, however, finding that even assuming the policy used to expel the Plaintiff was sufficiently precise, it was unconstitutionally applied to the Plaintiff. The trial court found that the approach used by the school administrators in this case lead "to trampling the constitutional rights of the plaintiff Christopher Scionti." (A-24). Both courts noted that although there were alternative disciplinary measures available to the

Defendant, it unreasonably failed to use them in this case. In analyzing the Defendant's decision not to make those alternatives available the appellate court observed that "defendant appears to have made an example of plaintiff for conduct which cannot be termed, under any stretch of the imagination, as 'gross misconduct'". (A-14). The trial court characterized the Defendant school district's behavior as "throwing the plaintiff to the wolves." (A-25). The trial court specifically found that the "School Board and the Administration over reacted to the so-called "possession" episode" and that the punishment imposed upon the Plaintiff "clearly shocks the conscience of the court." (A-27). The appellate court concluded that "expulsion, therefore was wholly unwarranted and accordingly, we determine that defendant unconstitutionally deprived plaintiff of his property interest in his education in this case through its arbitrary application of its drug policy and excessive punishment." (A-14).

The appellate court also found that the actions of the Defendant denied the Plaintiff the most minimal procedural due process safeguards. The court noted that the school district's refusal to identify the witnesses against the plaintiff and allow him to cross-examine them, given the fact that they were the only witnesses who actually observed the incident, violated minimum due process. The court also found "the administration's vouching for the reliability and credibility of the witnesses to be especially offensive to traditional notions of due process." (A-17). The court held that "Defendant provided plaintiff with a kangaroo court (as evidenced by Oleson's [the assistant principal] assertion to plaintiff's father that the school

"100 percent get[s] rid of every kid" it wants to and that it had never lost an expulsion hearing)." (A-16).

The trial court specifically found that the actions of the Defendant school district resulted in substantial injuries and losses. The trial court awarded the Plaintiff $153,660 in damages for his actual losses, including the past and future costs of psychological treatment, costs for alternative education, loss of social opportunities and emotional distress. (A-27). The trial court specifically found Defendant's expert's testimony on damages and their causation to have no credibility whatsoever. On the other hand, the trial court found Plaintiff's expert's testimony both as to the cause of the damages and as to the nature and extent of the Plaintiff's mental and emotional injuries to be very significant, and accorded it great weight. (A-27).

The appellate court also found the trial court's determination that the Plaintiff's injuries and losses resulted from Plaintiff's improper expulsion "was well founded from consideration of the evidence presented in this case."(A-19). The court further noted that Defendant's arguments regarding causation and damages were merely an invitation for the court to substitute its judgment for the factual determinations made by the trial court, and accordingly the court declined to do so. (A-19-A-20).

On May 31, 2000 the Illinois Supreme Court denied Defendant's Petition for Leave to Appeal. (A-1).

ARGUMENT

I. The Illinois Circuit Court and Appellate Court Decisions Correctly Determined That The Defendant's Actions Violated Both State Law and Plaintiff's Constitutional Rights to Substantive Due Process and Procedural Due Process.

A plaintiff may prevail on a substantive due process claim under Section 1983 by showing that the defendant intentionally or recklessly deprived him of a constitutional right. *Armstrong v. Squadrito,* 152 F.3d 564, 570 (7th Cir. 1998). Where the allegedly unconstitutional action results from the execution or implementation of a governmental entity's official policies, rules or regulations, the entity itself may be held directly liable under 42 U.S.C. 1983. *Board of County Commissioners v. Brown,* 520 U.S. 397,405, 117 S.Ct. 1382, 1389, 137 L.Ed.2d 626 (1997); see also, *Allen v. Board of Trustees of Community College District No. 508,* 285 Ill.App.3d 1031, 1037 (1996). Conduct that "shocks the conscience," actions taken with "deliberate indifference" to the Plaintiff's rights, or "truly irrational" governmental action deprives a person of his substantive due process rights. *Board v. Brown,* 520 U.S., at 405, 117 S.Ct. at 1389.

Defendant first argues that this case should be reviewed because it believes the Illinois courts' rulings on Plaintiff's procedural due process rights to know the identity of the witnesses against him, and to cross-examine them, conflicts with the decisions of the Seventh and Sixth Circuit Court of Appeals in *Linwood v. Board of Education of City of Peoria,* 463 F.2d 763 (7th Cir. 1972) and *Newsome v. Batavia Local School District,*

842 F.2d 920 (6th Cir. 1998). As discussed below, this argument is without merit because this case is so factually dissimilar, and because the Illinois courts held that *all* of the Defendant's actions combined to provide the Plaintiff with a "kangaroo court" where he had no hope of affecting the outcome. (A-17)

The Defendant's quarrel with the Illinois courts' procedural due process rulings ignores the overwhelming evidence that Defendant violated Plaintiff's substantive due process rights. Both lower courts found that the school district's deliberate indifference to Plaintiff's rights, its unconstitutional disciplinary policy, as well as its actions which "shocked the conscience" of the trial court, as exemplified by the school administration's declared intention to "100 percent get rid of every kid" it wanted to, all contributed to the deprivation of Plaintiff's rights. It was not just the lack of procedural safeguards the lower courts found to be arbitrary and capricious. It was the Defendant's arbitrary application of its impermissibly vague drug policy, and its use of a wholly unwarranted punishment which both the trial and appellate court found resulted in an intentional deprivation of the Plaintiff's right to an education. Thus, even if Defendant could obtain a review of the procedural due process rulings, we respectfully submit that the egregious and numerous violations of Plaintiff's substantive due process rights proved by the evidence alone justify the decisions below.

The decision in *Linwood, supra*, is not, however, in conflict with the rulings below. In *Linwood*, the written procedural rules of the school district specifically provided that both the student and his

attorney would have the right to cross-examine witnesses. The *Linwood* court indicated that the student did not have a pre-hearing right to have the district produce a list of witnesses and their proposed testimony. Nowhere, however, did the *Linwood* court even address, much less decide, that a student could be expelled by hearsay testimony of unidentified student witnesses presented only in a memorandum by school administrators. In short, nothing in the *Linwood* decision is in conflict with the rulings in this case.

Defendant's contention that the decision in this case is in conflict with the Sixth Circuit Court of Appeals ruling in *Newsome v. Batavia Local School District*, 842 F.2d 920 (6th Cir. 1998) is also based upon a misunderstanding of the *Newsome* ruling, and its application to the pertinent facts in this matter. In *Newsome*, the Court of Appeals reversed the District Court's dismissal of a student's claim for damages for an improper expulsion, finding that the student was denied minimal procedural due process when an administrator secretly presented evidence to the school board at his expulsion hearing. Id., at 927-928. The superintendent, in closed session, told the school board that Plaintiff had confessed his participation in the incident to an alcohol and drug counselor. The counselor, however, submitted an affidavit to the district court denying that any such confession ever occurred. The *Newsome* court ruled that Plaintiff was denied procedural due process, because "procedural due process, at a minimum, requires notice of both the charges and the evidence against the individual." Id. at 928, fn.7. The Court also ruled Plaintiff was not denied procedural due process because he was not allowed to cross-examine two student witnesses.

Defendant reasons that because the Illinois courts found the procedure employed to expel Plaintiff included a refusal to allow cross-examination of student witnesses, the decisions are in conflict with *Newsome*. Careful review of the appellate court's discussion of the procedural due process issues reveals, however, that it was the refusal to allow cross-examination *coupled* with the administration's vouching for the reliability and credibility of those witnesses, under the particular facts of this case which the court found offensive.

In *Colquitt v. Rich Township High School*, 298 Ill. App. 3d 856 (1st Dist. 1998), the Appellate Court applied the three prong test articulated by this Court in *Mathews v. Eldridge*, 424 U.S. 319, 334 96 S.Ct. 893, 902 (1976) to determine that a student was denied procedural due process. In *Colquitt*, just as in this case, the student witnesses were the only witnesses to the alleged misconduct, but did not testify. Instead, a school administrator presented their testimony and vouched for its credibility. The student and his attorney were prevented from learning the identity of the student witnesses and were not allowed to cross-examine them. The *Colquitt* court, relying on the *Eldridge* factors, concluded that the risk of error from the lack of adversarial testimony of witnesses in that case, substantially outweighed the countervailing interests of allowing a student to be convicted of gross misconduct through the admission of such unassailable hearsay statements.

Both *Colquitt* and the decision in this case are consistent with the well outlined principles in *Eldridge*.

This Court recognized that "due process is a flexible concept determined by the nature of the interest affected and the context in which the alleged deprivation occurs." Id. 424 U.S. 319, 334, 96 S.Ct. 893, 902 (1976). Defendant, however, seeks to undermine that flexibility by erroneously suggesting the adoption of an inflexible rule; i.e.; in no school expulsion case, can the identity of student witnesses or their cross-examination ever be constitutionally required. Just as the Illinois Appellate Court recognized, Defendant has failed to tie its abstract propositions to the actual circumstances of this case. (A-14, A-15). It has failed throughout these proceedings to demonstrate how Plaintiff was afforded procedural due process by the "kangaroo court" that was utilized. Specifically, it has failed to demonstrate to any Court how, given the procedure that was employed, any student could have possibly defended the charges. Under these circumstances, the decisions below are clearly not in conflict with the rulings of this Court or the Sixth and Seventh Circuit Court of Appeals. For this additional reason, Defendant's petition should be denied.

None of this, however, should provide this Court with a reason to review this case, because ironically, the "evidence" which the Defendant presented to the hearing officer through the deprivation of Plaintiff's procedural due process rights, still did not demonstrate that he committed an act of gross misconduct for which he could have been constitutionally expelled. Both the trial court and appellate court admonished the Defendant that its "evidence" that Plaintiff tasted the substance before he discarded it, or that he did not think the substance was real, or did not think that it was "coke," did not under

any stretch of imagination, establish that Plaintiff knowingly possessed a look-alike drug. (A-13, A-17-18, A-33). The trial court pointed out that our television programs and motion pictures consistently depict both "good guys and bad guys including police officers" engaging in the kind of activity the administration contended through this "evidence" that the Plaintiff engaged in. (A-33).

In short, irrespective of whether or not Defendant violated Plaintiff's procedural due process rights, the judgment entered in this cause is fully supported by the clear determination that the Plaintiff's expulsion pursuant to Defendant's look-alike drug policy violated his substantive due process rights. Except to complain that its disciplinary policy should be exempt from *any* judicial scrutiny, this Defendant has totally failed to offer a basis for overturning the lower courts' substantive due process rulings. Moreover, Defendant has failed to explain, irrespective of whether the Plaintiff's procedural due process rights were violated, how an expulsion of a student for temporary innocent possession of a non-controlled substance could ever be justified. For this reason as well, this Court should deny the Defendant's petition.

II. The Illinois Courts Did Not Apply Too Rigorous a Standard in Deciding That The Look-alike Drug Policy Was Impermissibly Vague or Unconstitutionally Applied to the Plaintiff.

Defendant also seeks review of this case, because it believes the Illinois courts required the school district's rules and the application of those rules to satisfy the standards required of criminal statutes. The

Defendant urges that by overturning Plaintiff's expulsion and awarding damages, the courts substituted their findings for that of the administration and school board. Because the lower court's written decisions so clearly do not support these claims, neither is a basis for this Court to grant certiorari.

First, the Defendant's position overlooks the appellate court's explicit statement that "[t]he rules at issue in this case are not, however, criminal statutes; rather they are school disciplinary rules and as such, they are not required to have the same precision as a criminal statute."(A-11 citing, *Wiemerslage v. Maine Township High School District 207*, 29 F.3d 1149,1152 (7th Cir. 1994)). The appellate court observed that the rules must provide sufficient certainty, fair warning and notice of what conduct is prohibited as measured by *common understanding*. Id. The court further noted "in order to pass constitutional muster, a rule must apprise the community of what conduct is prohibited and it must not leave those charged with implementing the rule too much discretion, so as to result in oppressive or discriminatory application". (A-11)

The Illinois courts in this case looked carefully at the testimony of the school administrators (something Defendant's petition predictably fails to discuss at all) and concluded that the policy was vague not only because the administrators charged with implementing the rule were left with too much discretion, but also because they could not even reach a consensus as to what conduct the policy prohibited. How a freshman student, such as the Plaintiff, in his first months in the district, was supposed to have been able to discern what conduct was prohibited, when those in charge of

enforcing the rule could not, is an *enigma* this Defendant has never, and we submit will never be able to explain.

The Defendant's policy was measured against a school standard, not a criminal standard. The Defendant's policy clearly failed the school standard. That is why the lower courts found it to be unconstitutional. Requiring school administrators to understand the rules they enforce, is no more onerous a burden than expecting students to understand the rules that govern their conduct.

In light of the above, the Defendant's contention that the lower courts applied a criminal standard to the look-alike drug policy is nothing more than another blatant false statement about the case. We respectfully submit that the reasons this Court grants certiorari should not be expanded to include a petitioner's misrepresentation of the record.

The lower courts also did not merely substitute their judgment for that of the administrators and the school board. They recognized that schools are entitled to discretion in disciplinary matters but also were quick to note that this discretion is not without limits. See, e.g., *Stratton v. Wenona Community Unit District No. 1*, 133 Ill.2d 413, 434 (1990). The Illinois courts found that expulsion was wholly unwarranted in this case and accordingly determined that the defendant unconstitutionally deprived plaintiff of his property interest in education. (A-14).

It is actually the Defendant that now asks this Court to substitute its judgment for the factual

determinations made by the trial court. Defendant wants this Court to step in and rule that on the basis of only the memorandum its administrators gave to the hearing officer, the school district's expulsion of the Plaintiff should be upheld. Defendant would have this Court simply ignore the testimony adduced during the many days of trial including the crucial testimony of the defendant administrators that exposed their "deliberate indifference" to Plaintiff's rights. Although it is certainly understandable why the school district in this case would prefer to base its appeal to this Court on something other than the evidentiary record, we urge this Court to decline to accept Defendant's invitation.

III. The Defendant School District's Execution and Implementation of Its Unconstitutional Look-alike Drug Policy Clearly Rendered It Liable Under 42 U.S.C. 1983 for Plaintiff's Injuries and Defendant Waived any *Monell* Related Defenses By Failing to Raise Them Below.

Defendant next concedes that school districts, like other governmental entities, can be held liable for injuries that result from an unconstitutional execution or implementation of official policies, rules, or regulations. *Monell v. Department of Social Services of the City of New York*, 436 US 658, 56 L ED 2D 611, 98 S.CT. 2018; *Armstrong v. Squadrito*, 152 F.3d 564, 570 (7th Cir. 1998). However, Defendant then makes another blatantly false statement about the record below to attempt to create a basis for review in this Court. At page 20 of its petition, the Defendant makes the following bizarre assertion: "In the instant case, a review of the Illinois Circuit and Appellate Court

opinions reveals that an analysis of any custom, policy or practice of the School District is conspicuously absent."

Obviously, the same alarming lack of understanding that caused this school district to believe it could impose expulsion upon a child for conduct that could not possibly have violated its arbitrary look-alike drug policy, now prevents the district from recalling that both the trial court and appellate court devoted substantial portions of their written opinions to a careful and thoughtful analysis of Defendant's look-alike drug policy, both as it was written, and as it was applied to the Plaintiff. One truly wonders how Petitioner could, in good faith, first argue to this Court that the lower courts applied a criminal standard to evaluate its policy, and in the very next section of its brief make the absurd statement that the courts' opinions are devoid of any evaluation of any school district policy.

Defendant complains that "it strains logic and demeans the judicial system when a court subsequently concludes that a school district's rule against possessing look-alike drugs is unconstitutionally vague." Defendant's statement reveals its arrogant and erroneous belief that no court anywhere should ever be able to evaluate whether any part of any school district's disciplinary policy is unconstitutional or whether its execution and implementation has resulted in an unconstitutional deprivation. It is well established that a rule or regulation is impossibly vague and violates due process if it leaves the regulated community unsure of what conduct is prohibited or fails to provide adequate guidelines to those charged

with its enforcement. *Granite City Division of National Steel Co. v. Illinois Pollution Control Board*, 155 Ill. 2d 149, 163 (1993). The fact that the Illinois courts found the policy and rules at issue in this case could not pass even a school community standard, neither strains logic nor demeans the judicial system.

There cannot be any question that the deprivation of Plaintiff's rights resulted directly from the execution and implementation of the Defendant School District's rules regarding look-alike drugs contained in its official disciplinary policy. Nor can there be any question that the school district's written policy and its arbitrary enforcement of that policy were the "moving force" behind Plaintiff's injuries. Under these circumstances the Defendant school district is clearly liable for the Plaintiff's injuries.

In any event, Defendant has waived any claim that the evidence adduced in this case was not sufficient to impose municipal liability against the school district under *Monell*. Attached as Plaintiff's Appendix A, is an excerpt of Plaintiff's brief before the Illinois Appellate Court detailing the affirmative defenses raised in the trial court that were not mentioned on appeal. This Court has repeatedly held that it will not decide questions not raised or resolved in the lower courts. *Youakim v. Miller*, 425 U.S. 231, 234, 96 S.Ct. 1399, 1401, 47 L.Ed.2d 701 (1976) (per curiam); cf. *Oklahoma City v. Tuttle*, 471 U.S. 808, 816, 105 S.Ct. 2427, 2432, 85 L.Ed.2d 791 (1985). Clearly, the Defendant did not present the arguments below that it now seeks to have this Court consider. Accordingly, this Court should not grant certiorari to review

Defendant's latent claim that it is not subject to liability under *Monell*.

IV. The Evidence Presented Clearly Supported The Trial Court's Award of Damages.

Finally, Defendant asks this Court to reweigh the evidence presented at trial regarding damages. Defendant relies on this Court's decision in *Carey v. Piphus*, 435 U.S. 247, 98 S.Ct. 1042 (1978) for its contention that the Illinois courts erred in awarding Plaintiff damages for the injuries he sustained as a result of his improper expulsion. Defendant's reliance on *Carey* is misplaced.

In *Carey*, this Court held that mental and emotional distress is compensable under Section 1983 for a deprivation of due process where the evidence demonstrates the injuries resulted from the deprivation. 435 U.S. 247, 263, 98 S.Ct. 1042, 1052. The Court of Appeals' decision in that case seemed to infer that injury could always be "presumed" to flow from every denial of due process, in the same manner that actual damages are often "presumed" in a *per se* defamation claim. This Court rejected that analysis, holding "neither the likelihood of such injury, nor the difficulty in proving it is so great as to justify awarding compensatory damages without proof that such injury actually was caused." Id. Because *no* evidence on damages had been presented in *Carey*, the Court remanded the case with instructions that if the school district in that case proved that the student suspension was justified, the student would be entitled to recover only $1 in nominal damages for the due process violations.

Nothing in *Carey*, however, supports the view advanced by the Defendant in this case that the Plaintiff is entitled to only nominal damages. Here, as reflected in both the trial court and appellate court opinions, the evidence overwhelmingly established that Plaintiff's mental and emotional injuries were caused by the deprivation of Plaintiff's rights. Moreover, the record below convincingly demonstrates that under no "stretch of the imagination" was Plaintiff's outright expulsion justified. Thus, there is no basis whatsoever for finding that the alleged injuries were attributable to a *justified* deprivation, and accordingly, Defendant's claim that Plaintiff's damages should be reduced to $1.00 is incorrect.

Defendant's argument is again nothing more than a request that this Court re-weigh the factual and credibility determinations the trial court made in both concluding that Plaintiff's injuries were casually linked to the Defendant's actions and in determining the amount of damages to be awarded. The Illinois Appellate Court already considered and rejected outright Defendant's claim that the evidence adduced did not support the trial court's award of damages. The Appellate Court specifically found that the Defendant's request was nothing more than an invitation to have the Appellate Court substitute its judgment for the factual determinations of the trial court, which the Appellate Court declined to do. This Court should likewise deny Defendant's Petition.

CONCLUSION

For the reasons set forth herein, Respondent respectfully requests that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

Stephen M. Cooper
Peter M. Storm
Counsel of Record
Philip J. Piscopo
LAW OFFICES OF
COOPER & STORM
117 S. Second Street
P.O. Box 388
Geneva, IL 60134
630-232-6170

Attorneys for Respondent
Christopher Scionti

APPENDIX — EXCERPTS FROM BRIEF OF PLAINTIFF-APPELLEE IN THE APPELLATE COURT OF ILLINOIS

[commencing at page 13]

* * *

I. Defendant Has Waived Certain Issues On Appeal

In the trial court, Defendant raised various defenses and other issues which are not addressed in its brief. In its original answer to Plaintiff's amended Count V, Defendant filed five separate affirmative defenses. (C326, 333-335). Those affirmative defenses were the following:

(a) That the individual defendants were entitled to immunity under the Local Governmental and Governmental Employees Tort Immunity Act 745 ILCS 10/1-101 et seq.;

(b) Section 105 ILCS 5/10-22.6 provides that no action would lie against the Defendants for the expulsion of students guilty of gross misconduct;

(c) Plaintiff's claim under 42 U.S.C. Section 1983 failed to state a cause of action;

(d) The Fourteenth Amendment to the United States Constitution does not provide rights and protections for the injuries claimed;

(e) Plaintiff did not have certain due process rights in a student expulsion hearing; (C334-335).

On September 11, 1997 the trial court entered an order granting Plaintiff's motion to Strike as to the second and fourth listed defenses in their entirety, and as to a substantial portion of the fifth listed defense. (C350). Defendant was granted leave to amend defense no. 4. Defendant has not appealed from this order.

[14] At trial, Defendant sought to introduce certain additional affirmative defenses. (C946)

1. Plaintiff has waived any constitutional attack on any School District actions before the underlying expulsion because the same was not raised at the expulsion hearing.

2. Plaintiff has waived any claim concerning the provision of special education or remedial services after his expulsion or after the Court reversed the order of expulsion in September 1996 given that Plaintiff has failed to pursue available remedies for such a claim under the *Individuals With Disabilities Education Act.*

(C949)

The Court denied Defendant's Motion for Leave to File these additional defenses. (C982). Defendant has not appealed from this order either.

It is well settled that issues that are not raised or argued before the appellate court are deemed waived. *Tivoli Enterprises, Inc. v. Zehnder*, 297 Ill. App. 3d 125,

696 N.E. 2d 1202, 1204 (2d Dist. 1998); *Kincaid v. Ames Department Stores, Inc.*, 283, Ill. App. 3d 555, 570, 670 N.E. 2d 1103 (1996). None of the foregoing affirmative defenses, nor the trial court's rulings with regard to them are addressed in Defendant's brief. Accordingly, they should be deemed to have been waived.

Defendant has also failed to provide citations to the record to support several of its arguments. For example, the sole citation to the record in Defendant's argument regarding damages is to one page of the trial court's order. Defendant has, therefore, waived its argument on causation and damages.

Supreme Court Rule 341(e)(7), mandates that an appellant provide citation to the pages of the record he relies upon to support his claim. *See, e.g., Sohaey v. VanCura*, 240 Ill. App. 3d 266, 273-274 (2d Dist. 1993). A reviewing court is entitled to have [15] issues clearly defined with pertinent authority cited and coherent arguments presented; arguments that are inadequately presented on appeal are waived. *McCarthy v. Denkovski*, __ Ill. App. 3d __, 1998 WL 672087, 672087, 703 N.E.2d 408 (1st Dist. 1998); *Homstrom v. Kunis*, 221 Ill. App. 3d 317, 325, 163 Ill. Dec. 723, 581 NH.E. 2d 877 (1991).

II. The Evidence At Trial Established That The Defendant's Policy And Practices Rendered It Liable To The Plaintiff Under 42 USC Sec 1983

The parties in this action agreed as to the basic elements necessary to establish liability under 42 U.S.C. Section 1983.

At page 12 of the Defendant's Memorandum of Law in Support of its Motion for Summary Judgment, it set forth the applicable statutory and decisional law. (C655). During closing arguments, Plaintiff's counsel outlined these elements to the trial court, reading from the Defendant's Memorandum: (R1161-1163)

"A Section 1983 claim is predicated on two elements: 1) the conduct complained of must have been committed by a person acting under color of state law; and 2) this conduct must have deprived the plaintiff of rights, privileges or immunities secured by the Constitution of laws of the United States. *Whitehorn v. Harrelson*, 758 F.2d 1416, 1419 (11th Cir. 1985) (citing (*Paratt v. Taylor*, 451 U.S. 527, 535, 101 S.Ct. 1908, 1912 (1981). A governmental entity is liable under 42 U.S.C. Section 1983 only when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury for which the government as an entity is responsible. *Baxter v. Vigo County School Corp.*, 26 F.3d 728, 734 (7th Cir. 1994) (citing *Monell v. Dept. of Social Services*, 436 U.S. 658, 98 S.Ct. 2018 (1978)." (Quote taken from Defendant's Memorandum of Law in Support of its Motion for Summary Judgment, at page 12, C655).

* * * *